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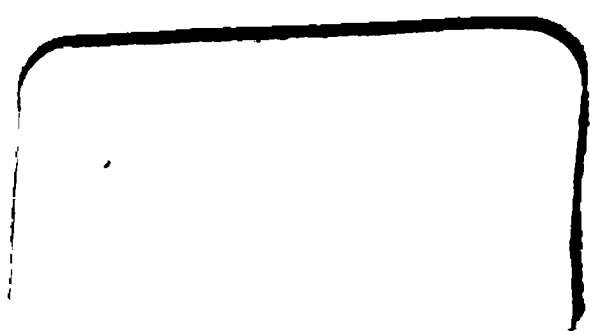
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A TREATISE
ON THE
LAW OF EVIDENCE
IN
CRIMINAL ISSUES.

BY
FRANCIS WHARTON, LL. D.,
AUTHOR OF TREATISES ON "CRIMINAL LAW," "EVIDENCE," "CONFLICT OF LAWS,"
AND "NEGLIGENCE."

IN ONE VOLUME.

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PREFACE.

IN the seventh edition of my work on Criminal Law, such points of evidence as are likely to arise in Criminal Trials are discussed as the incidents of Pleading and Practice. In preparing the present edition, however, I felt that it had become necessary to separate these topics. This is now done. To the Principles of Criminal Law two volumes have been assigned; to Pleading and Practice in Criminal Issues, one volume. In this volume I have undertaken to present a complete and systematic Treatise of Evidence, so far as is requisite for use in Criminal Trials. The volume, as thus constituted, has a two-fold object. It completes the series on Criminal Law, of which three volumes were published a few weeks ago; and it is a supplement to my work on Evidence in Civil Issues.

To Wm. E. Russell, Esq., of Cambridge, I am indebted for aid in carrying this volume through the press.

F. W.

June 19, 1880.

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EMENDATIONS.

- Page 73.** Note 4, after "Hudson v. State," insert "6 Tex. Ap. 365."
- Page 122.** First line in § 143, change "obligations" to "allegations."
- Page 172.** End of first paragraph of note, for "Warren v. Nichols, 6 Cow. 162," read "Warren v. Nichols, 6 Met. 261; Wilber v. Selden, 6 Cow. 162."
- Page 206.** First column of note, next line to end, for "§ 254" read "§ 263."
- Page 229.** Note 3, for "Infra, § 804," read "Infra, §§ 634, 804."
- Page 244.** Note 9, for "8 Heisk." read "3 Heisk."
- Page 286.** Second line of first column of note, for "4 K. & J." read "1 K. & J."
- Page 336.** First line of § 424, for "known" read "settled."
- Page 399.** Note 4, for "56 N. J." read "56 N. Y."
- Page 566.** First column, lines 6 and 7, erase the sentence beginning "In sport," &c.

CRIMINAL EVIDENCE.

CHAPTER I.

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§ 1. SUBJECT to exceptions to be hereafter specifically noticed, the tests for the admission of evidence are the same in criminal as in civil issues. As to the weight of evidence, however, when admitted, a fundamental distinction exists. In civil suits both parties are subjects of the State, with equal rights in the eye of the law. For the one or the other a verdict must be found, and this verdict must be on a preponderance of proof, however slight, no matter how long a jury may hesitate, no matter how evenly the scales may for a time hang. The parties, viewing them in the aggregate, enter the contest with advantages about equal, and are entitled to equal privileges. On the other hand, in a criminal prosecution, the State is arrayed against the subject; it enters the contest with a prior inculpatory finding of a grand jury in its hands; with unlimited command of means; with counsel usually of authority and capacity, who are regarded as public officers, and

Proof of guilt must be beyond reasonable doubt.

therefore as speaking semi-judicially; and with an attitude of tranquil majesty, often in striking contrast to that of a defendant engaged in a perturbed and distracting struggle for liberty if not for life. These inequalities of position the law strives to meet, by the rule that there is to be no conviction when there is a reasonable doubt of guilt. What is reasonable doubt, in this sense, has been greatly discussed. Without attempting to examine in detail the mass of cases in which this discussion has been pursued, we may say, as a general rule, that in criminal trials there should be acquittals in all cases in which, if the issue were in a civil suit, the verdict on the one side or the other would rest on a bare preponderance of proof. The rule is not that there must be an acquittal in all cases of doubt, because, as we shall presently see, this would result in acquittals in all cases, since there is no case without doubt. Doubt, of the character that requires an acquittal, must be far more serious than the doubt to which all human conclusions are subject. It must be a doubt so grave and substantial as to produce, in the juror entertaining it, long and anxious uncertainty as to the verdict he should give.¹ "It is not mere possible doubt; because," says Chief Justice Shaw,² "everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition, that they cannot say they feel an abiding conviction to a moral certainty of the charge."³

¹ *Infra*, § 330; *R. v. Tichborne*, Cockburn, C. J. ii. 816; *U. S. v. Foulke*, 6 McLean, 349; *Com. v. Sturdevant*, Whart. on Hom. App.; *Com. v. Harman*, 4 Barr, 270; *Com. v. Drum*, 58 Penn. 9; *Green v. Com.* 83 Penn. St. 75; *Holloway v. Com.* 11 Bush, 344; *Giles v. State*, 6 Ga. 285; *Malone v. State*, 49 Ga. 210; *Moughon v. State*, 57 Ga. 102; *Winter v. State*, 20 Ala. 39; *Williams v. State*, 52 Ala. 411; *Owens v. State*, 52 Ala. 400; *Ray v. State*, 50 Ala. 104; *Cohen v. State*, 50 Ala. 108; *Bowler v. State*, 41 Miss. 570; *Garrard v. State*, 50 Miss. 147; *State v. Schoenwald*, 31 Mo. 147;

Hiller v. State, 4 Blackf. 552; *Sumner v. State*, 5 Blackf. 579; *Line v. State*, 51 Ind. 172; *Jarrell v. State*, 58 Ind. 293; *Earll v. People*, 73 Ill. 329; *State v. Collins*, 20 Iowa, 85; *State v. Dineen*, 10 Minn. 407; *State v. Rover*, 13 Nev. 17; *State v. Hamilton*, 13 Nev. 386; *Shultz v. State*, 13 Tex. 401; *State v. Glass*, 5 Oreg. 73; *People v. Shuler*, 28 Cal. 493; *People v. Ah Sing*, 51 Cal. 372.

² *Bemis's Webster case*, 190; *Com. v. Webster*, 5 Cush. 320; *Com. v. Goodwin*, 14 Gray, 55. See *R. v. White*, 4 F. & F. 383.

³ See also 1 Phillips Ev. 156; 1

§ 2. Proof is the sufficient reason for assenting to a proposition as true. It is a *reason*, because our whole system of jurisprudence rests on the assumption that the person to whom, as a juror or judge, is committed the determination of a litigated issue, is governed by his reasoning faculties in coming to the decision he is to give. It in no way derogates from this position that in many cases we are

Proof is the sufficient reason for a proposition.

Starkie on Ev. 478; 3 Greenl. Ev. § 29; *People v. Bennett*, 49 N. Y. 144; *Donelly v. State*, 2 Dutch. (N. J.) 601; *French v. State*, 12 Ind. 670; *James v. State*, 45 Miss. 572; *State v. Ostrander*, 18 Iowa, 435; *Pilkinson v. State*, 19 Tex. 214.

“The phrase, ‘moral certainty,’ has been introduced into our jurisprudence from the publicists and metaphysicians, and signifies only a very high degree of probability. It was observed by Pufendorf, that ‘When we declare such a thing to be morally certain, because it has been confirmed by credible witnesses, this moral certainty is nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us.’ *Law of Nature and Nations* (Eng. ed. 1749), book i. c. 2, s. 11. ‘Probable evidence,’ says Bishop Butler, in the opening sentence of his *Analogy*, ‘is essentially distinguished from demonstrative by this, that it admits of degrees, and of all variety of them, from the highest moral certainty to the very lowest presumption.’

“Proof ‘beyond a reasonable doubt’ is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof ‘to a moral certainty,’ as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by

eminent judges to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.” Gray, C. J., *Commonwealth v. Costley*, 118 Mass. 21.

“A reasonable doubt must be an honest and conscientious difficulty in believing; one not merely subtle or ingenious, it must arise out of the evidence, and not be fanciful, or be conjured up to escape consequences; it must strike the mind with such force as to compel it to pause in yielding belief.” Agnew, C. J., *Meyer v. Com.* 83 Penn. St. 131.

As to burden of proof see *infra*, §§ 319 *et seq.* As to *corpus delicti* see *infra*, §§ 324 *et seq.* As to *alibi* see § 333; provocation, see § 334; necessity, see § 335; insanity, see § 336. As will be seen (*infra*, §§ 333 *et seq.*), the rule as to reasonable doubt applies to the whole of the prosecution’s case. Thus, where it is doubtful which of two persons, between whom there was no concert, shot the deceased, the doubt must operate to work an acquittal. *People v. Woody*, 45 Cal. 289.

The remarks on this topic in the charge of Cockburn, C. J., in the Tichborne case (*Trial, &c.* ii. 816), are peculiarly worthy of consideration.

led, and led correctly, to conclusions by the authority of others ; since there is no higher exercise of reason than that of deciding, in matters in which we have not ourselves the materials or aptitude for forming a judgment, to what sources we shall resort for advice, and then, when we have made this decision to the best of our powers, adopting and acting on the advice given.] And the reason must, at the same time, be *sufficient* ; it must not be a whim, known by us to be such. We must feel it to be strong enough to justify us in the conclusion we adopt. And in criminal trials this conclusion, as we have seen, must be beyond reasonable doubt. A juror, to state the proposition before us in the concrete, is bound to take into consideration, in making up his judgment, only two classes of facts : first, those that are put in evidence in the case ; and, secondly, those of common notoriety. In arguing from these facts he must act according to his own lights, and must not agree to a verdict of conviction unless he conscientiously holds that guilt is proved beyond reasonable doubt. The conscience under which he acts must be his own conscience ; the reason his own reason. But among the arguments he is bound to consider are the inferences drawn from these facts by those persons to whom the law requires him to listen on the trial of the cause. These persons are counsel engaged in arguing the case ; the judge, to whom belongs the office of adjudicating the law, and, in most jurisdictions, of summing up the facts ; and his fellow-jurors, with whom it is his duty to deliberate. Keeping this distinction in mind, two important sanctions are preserved. The first is, that no case is to be decided on facts which are not either of common notoriety, or are proved in open court according to the rules of law. The second is that while each juror finds his verdict according to his own lights, and in obedience to his own conscience, he is aided in coming to his conclusion, not merely by professional and judicial advice, but by consultations with his associates. The verdict may be a compromise. But it is not a compromise adopted unreasonably, or under coercion. It is a compromise which is reasonable and conscientious, so far as concerns each party assenting to it, because authority, in the sense in which it is above defined, is here, as well as in multitudinous analogous cases, one of the legitimate arguments by which a conclusion is reasonably and conscientiously reached.

§ 3. "Proof," in the sense in which the term is here used, has a wider meaning than "evidence." Evidence includes the reproduction, before the determining tribunal, of facts either notorious or verified in open court. Proof, in addition, includes presumptions either of law or fact, and citations of law,¹ and comprehends all the grounds on which a conclusion in a litigated case may be reached. Evidence, when not matter of notoriety, recognized as such by the court, is adduced only by the parties, through witnesses, documents, or inspection. Proof may be adduced by counsel in argument, or by the judge in summing up a case.²

§ 4. For the purposes of public justice, it is essential to maintain with rigor the distinction between juridical (*veritas juridica, forensis*) and moral truth. I may have, for instance, as a juror, a moral conviction of the guilt of a defendant on trial. He may have confessed his guilt to me; or I may have learned from persons, not called as witnesses, facts inconsistent with his innocence. This, however, is not to be permitted to have the slightest effect on my juridical reasoning; for, to punish even a guilty man without juridical certainty of his guilt would be recognizing a principle fatal to public justice. The defendant is a bad man, it may be argued, and it is better for the community that he should be put in prison; or he belongs to a political or religious party which it is important to suppress; or we have private information convincing us of his guilt; or he has acted fraudulently or oppressively in so many other matters that it may be inferred that he acted fraudulently or oppressively in those under investigation; and hence he should be convicted. If such considerations are to be received to affect the judgment of court or jury, there would be no case tried in which some prejudice, popular or personal, on the part of the adjudicating tribunal, would not be made the basis of a verdict. If so, not only would innocent men be convicted in consequence of prejudices extra-judicially invoked against them, but guilty men would escape in consequence of prejudices extra-judicially invoked in their favor. The only safe course, therefore, is to

Evidence
is proof
admitted
on trial.

Object of
evidence is
juridical
conviction.

¹ See *Harvey v. Smith*, 17 Ind. 272. to bring, the mind to a just conviction of the truth or falsehood of the

² Mr. Livingston (*Works*, ed. of 1873, i. 419) defines evidence to be fact asserted or denied."

"that which brings, or contributes

found the verdict exclusively on evidence duly received, and on inferences logically to be drawn from such evidence. The issue in this way is made dependent upon the best proof that can be obtained ; and the defendant is able to meet the evidence adduced against him, to overcome it, if he can, by counter testimony, and to have notice of, and refute if he can, the inferences drawn from the case of the prosecution. The distinction before us is illustrated in criminal prosecutions by the exclusion from the jury-box of all persons who have formed such an opinion on the case as will interfere with their coming to an unbiased conclusion on the proofs admitted on the trial, and by the direction of the court to the jurors to be influenced by no considerations not sustained by such proofs. And a still more complete announcement of the principle is to be found in the great exclusionary tests adopted in this respect by all jurisprudences. No evidence is to be admitted, in a criminal issue, which does not bear on the question whether the defendant did a particular act specifically charged against him. And no evidence is to be received which is a second hand rendering of testimony not produced, though producible, by which a higher degree of certainty could be secured.

§ 5. Jurisprudence, as we are reminded by Mr. Bentham, is the science of conflicting analogies ; the object of proof is to show what analogies are, and what are not, applicable. “ The inference of analogy is an inference from particulars or individuals to a coördinate particular or individual. Its scheme is the following : —

M. is P.
S. is similar to M.
<hr/>
S. is P.

Or more definitely, since it also gives that in which the similarity consists, the following : —

M. is P.
M. is A.
S. is A.
<hr/>
S. is P.” ¹

¹ Ueberweg's System der Logik, Bonn, 1857, § 132. I have consulted

In other words, we say : —

“ M. who fled from trial, was guilty ;
S. is similar to M. in fleeing from trial :
Therefore S. is guilty.”

But to test the force of such an argument we must first inquire how far we can, by induction, reach a general proposition which can be a sound basis for a conclusion affecting S. with the same taint as is attached to M. If, for instance, our induction is sufficiently extensive to enable us to say, “ All persons who flee from justice are guilty,” we then can conclude that, because S. flees from justice, S. is guilty. But if the general proposition which we reach is nothing more than this, “ The chances are one to three that a person fleeing from justice is guilty ; ” then all that we can conclude as to S., who flees from justice, is that it is one to three that S. is guilty.

§ 6. Hence it is that when we reach a conclusion as to the guilt or innocence of a person on trial it is by the cumulation of probabilities, of which one alone is inadequate (unless in very exceptional cases) to sustain a conclusion. Thus, to take a case of larceny for illustration, it is one to five that because A. was seen prowling about the premises a short time before, he is guilty ; it is one to five that because at the time he had a sudden accession of unexplained wealth, he is guilty ; it is one to five that because he displayed peculiar tremor when arrested, he is guilty ; it is one to two that because he was unable to explain his possession of some parts of the stolen property, he is guilty.

Conclusion
reached by
a cumula-
tion of
probabili-
ties.

It is true that we may suppose a case in which there is what is called “ direct ” testimony to the fact of guilt ; but when we examine this testimony, as will presently be seen, we find that it derives its weight from circumstances.¹

Lindsay’s translation in the above rendering. Mr. Lindsay refers to Mill’s Logic, ii. p. 122, ff.; De Morgan’s Formal Logic, or Calculus of Inference, Necessary and Probable, pp. 170–210; and Boole’s Laws of Thought, pp. 243–399.

which was a case of homicide by shooting, the defendant requested the court to instruct the jury that they must consider separately every material allegation in the indictment, including time, place, and means, and that the fact that they might find any one allegation proved must not be

¹ In *Com. v. Costley*, 118 Mass. 1,

§ 7. No evidential fact, therefore, we may broadly state, can be demonstrated. The most that we can reach is a high probability that the fact in question is true. “I conceive that it is impossible even to expound the principles and method of induction, as applied to natural

No evidential fact can be demonstrated.

taken to aid in, or be connected with, the determination of any other allegation. The court instructed the jury that every material fact essential to establish the offence must be found separately, in the sense that it must be found and established in their minds; but that it was not necessary for them to separate the facts in finding, nor to detach one fact from another; that if they found clearly that the defendant shot the pistol, that fact might be used in connection with the other evidence in finding the other facts involved in the indictment, such as malice; that it of course must aid, will aid, in connection with the evidence of his whereabouts; and might aid in fixing the time, the place, the means. It was ruled by the Supreme Court that the defendant had no ground of exception.

“The truth of a conclusion may be regarded as a compound event, depending upon the premises happening to be true; thus, to obtain the probability of the conclusion, we must multiply together the fractions expressing the probabilities of the premises. Thus, if the probability is $\frac{1}{2}$ that A is B, and also $\frac{1}{2}$ that B is C, the conclusion that A is C, on the ground of these premises, is $\frac{1}{2} \times \frac{1}{2}$ or $\frac{1}{4}$. Similarly if there be any number of premises requisite to the establishment of a conclusion and their probabilities be $m, n, p, q, r, \&c.$, the probability of the conclusion on the ground of these premises is $m \times n \times p \times q \times r \times \dots$. This product

has but a small value, unless each of the quantities $m, n, \&c.$, be nearly unity.

“But it is particularly to be noticed that the probability thus calculated is not the whole probability of the conclusion, but that only which it derives from the premises in question. Whately’s¹ remarks on this subject might mislead the reader into supposing that the calculation is completed by multiplying together the probabilities of the premises. But it has been fully explained by De Morgan² that we must take into account the antecedent probability of the conclusion; A may be C for other reasons besides its being B, and, as he remarks, ‘It is difficult, if not impossible, to produce a chain of argument of which the reasoner can rest the result on those arguments only.’ We must also bear in mind that the failure of one argument does not, except under special circumstances, disprove the truth of the conclusion it is intended to uphold, otherwise there are few truths which could survive the ill-considered arguments adduced in their favor. But as a rope does not necessarily break because one strand in it is weak, so a conclusion may depend upon an endless number of considerations besides those immediately in view. Even when we have no other information we must not consider a statement as devoid of all probability. The true expression of complete doubt is a ratio of equality between the chances in favor of and against it;

¹ Elements of Logic, book iii. sections 11 and 18.

² Encyclopædia Metrop. art. Probabilities, p. 400.

phenomena, in a sound manner, without resting them upon the theory of probability. Perfect knowledge alone can give certainty, which is clearly beyond our capacities. We have, therefore, to content ourselves with partial knowledge, — knowledge mingled with ignorance producing doubt.”¹ “Inferences which we draw concerning natural objects are never certain except in a hypothetical point of view. . . . Even the best established laws of physical science do not exclude false inference.”² “Like remarks may be made concerning all other inductive inferences.”³

and this ratio is expressed in the probability $\frac{1}{2}$.

“Now, if A and C are wholly unknown things, we have no reason to believe that A is C rather than A is not C. The antecedent probability is then $\frac{1}{2}$. If we also have the probabilities that A is B $\frac{1}{2}$, and that B is C $\frac{1}{2}$, we have no right to suppose that the probability of A being C is reduced by the argument in its favor. If the conclusion is true on its own grounds, the failure of the argument does not affect it; thus its total probability is its antecedent probability, added to the probability that this failing, the new argument in question establishes it. There is a probability $\frac{1}{2}$ that we shall not require the special argument; a probability $\frac{1}{2}$ that we shall, and a probability $\frac{1}{2}$ that the argument does in that case establish it. Thus the complete result is $\frac{1}{2} + \frac{1}{2} \times \frac{1}{2}$, or $\frac{3}{4}$. In general language, if a be the probability formed on a particular argument, and c the antecedent probability, then the general result is $I - (I - a)(I - c)$, or $a + c - ac$. We may put it still more generally in this way: Let a, b, c, d , &c., be the probabilities of a conclusion grounded on various arguments or considerations of any kind. It is only when all the arguments fail that our conclusion proves finally untrue; the probabilities of each failing are respectively $I - a, I - b, I - c$, &c.;

the probability that they will all fail $(I - a)(I - b)(I - c) \dots$; therefore, the probability that the conclusion will not fail is $I - (I - a)(I - b)(I - c) \&c. \dots$. On this principle it follows that every argument in favor of a fact, however flimsy and slight, adds probability to it. When it is unknown whether an overdue vessel has foundered or not, every slight indication of a lost vessel will add some probability to the belief of its loss, and the disproof of any particular evidence will not disprove the event.” Jevons’ Principles of Science, i. 239.

¹ Jevons’ Principles of Science, i. 224.

² Ibid. 271 *et seq.*

³ Ibid. p. 274.

“Probable evidence is essentially distinguished from demonstrative by this, that it admits of degrees, and of all variety of them, from the highest moral certainty to the very lowest presumption. We cannot, indeed, say a thing is probably true upon one very slight presumption for it; because, as there may be probabilities on both sides of a question, there may be some against it; and though there be not, yet a slight presumption does not beget that degree of conviction which is implied in saying a thing is probably true. But that the slightest possible presumption is of the nature of a probability appears from hence;

“No matter of fact, that is to say, no actual phenomenon of external nature, can, in any possible state of human knowledge, be a matter of demonstration.”¹ There is no statement, however simple, as will presently be seen more fully, that does not contain at least four elements of incertitude. (1.) Language in itself more or less ambiguous. (2.) Doubt as to the identity of the subject; *e. g.* W. testifies that A. did a particular thing, and the question is whether A. was the person whom W. really saw. (3.) Doubt as to the copula; *i. e.* it can never be perfectly demonstrated whether what A. did was a real or only an

that such low presumption, often repeated, will amount even to moral certainty. Thus a man's having observed the ebb and flow of the tide to-day affords some sort of presumption, though the lowest imaginable, that it may happen again to-morrow; but the observation of this event for so many days, and months, and ages together, as it has been observed by mankind, gives us a full assurance that it will.” Butler's Analogy, Int. adopted by Gray, C. J. 118 Mass. 21. Compare Balfour's Defence of Historic Doubt, London, 1879.

“The proposition of Bishop Butler, that probability is the guide of life, is not one invented for the purposes of his argument, nor held by believers alone. Voltaire has used nearly the same words:—

“‘Presque toute la vie humaine roule sur les probabilités. Tout ce qui n'est pas démontré aux yeux, ou reconnu pour vrai par les parties évidemment intéressées à le nier, n'est tout au plus que probable. L'incertitude étant presque toujours le partage de l'homme, vous vous détermineriez très-rarement, si vous attendiez une démonstration. Cependant il faut prendre un parti; et il ne faut pas prendre au hasard. Il est donc nécessaire à notre nature faible, aveugle, toujours su-

jette à l'erreur, d'étudier les probabilités avec autant de soin, que nous apprenons l'arithmétique, et la géométrie.’

“Voltaire wrote this passage in an Essay not on religion, but on judicial inquiries (*Essai sur les Probabilités en fait de Justice*), and the statement of principle which it propounds is perhaps on that account even more valuable.

“If we consider subjectively the reasons upon which our judgments rest, and the motives of our practical intentions, it may in strictness be said that absolutely in no case have we more than probable evidence to proceed upon; since there is always room for the entrance of error in that last operation of the percipient faculties of men, by which the objective becomes subjective; an operation antecedent, of necessity, not only to action, or decision upon acting, but to the stage at which the perception becomes what is sometimes called a ‘state of consciousness.’” Gladstone, *Gleanings of Past Years*, vol. vii. p. 154, London, 1879.

¹ Mansel on the Limits of Demonstrative Science, Letters, Lectures, &c. 1873, p. 98; and see *Coleman v. State*, 59 Ala. 52.

apparent act. (4.) Doubt as to the object; *i. e.* whether the object operated upon was or was not B.

§ 8. Undoubtedly scientific conclusions, so far as they deal with abstractions, can be demonstrated. It is demonstrable, for instance, that a straight line is the shortest distance between two points; but no particular road between two places (*e. g.* New York and Boston) can be demonstrated to be perfectly straight.¹ If we assume a perfectly unresisting medium, and a perfectly constructed pistol, we can determine beforehand what will be the course of a ball sent by such a pistol through such a medium; but we cannot beforehand determine absolutely the course of a pistol ball which passes through the human frame.² It is a demonstrable conclusion that two bodies equal to a third are equal to each other, and on this our whole system of measurement and weight rests. The proposition, however, as we now give it, is an abstraction, touching in no respect our practical life. When we come to the concrete question, whether, for instance, two yards of cloth, separately measured by the same standard, have the same length, or whether two pounds of coffee weighed separately in the same scales have the same weight, then a conclusion can be only proximately reached.

Even scientific conclusions cannot be demonstrated.

§ 9. We may turn for further illustration to physical science in her most solemn attitude, when she stands with uplifted hand in the witness-box, and swears, by the most sacred sanctions that the law can propose, to tell, as to the particular matters propounded to her, the truth, the whole truth, and nothing but the truth. The cases in which she

Even the highest expert testimony fails in this respect.

¹ "In measurement we can never attain perfect coincidence. Two measurements of the same base line in a survey may show a difference of some inches, and there may be no means of knowing which is the better result. A third measurement would probably agree with neither. To select any one of the measurements would imply that we knew it to be the most nearly correct one, which we do not. In this state of ignorance, the only guide is the theory of probability, which proves

that in the long run the mean of different quantities will come nearly to the truth. In all other scientific operations whatsoever, perfect knowledge is impossible, and when we have exhausted all our instrumental means in the attainment of truth, there is a margin of error which can only be safely treated by the principles of probability." Jevons' *Principles of Science*, i. 230-31.

² See *Saunders v. State*, 37 Tex. 310. *Infra*, § 771.

is thus required to speak are not rare or exceptional. There is no topic, humble or sublime, within the whole range of physical investigation, as to which she is not called upon to testify. Wherever there is a specialty in which there is an expert, there the expert may be examined as to the specialty. Hence we have had experts examined as to the measurements by astronomers of the stars, and as to the measurements by tailors of coats. We have had experts examined as to the habits of fish seeking to ascend in the spring on Maine rivers, and as to the habits of cattle as they sweep in droves over the Texas plains. We have had them examined as to whether sewerage produces certain infusoria, and whether these infusoria produce pestilence. There is not a poison as to which their testimony is not invoked ; there is not a wound whose effects they may not be called to detail. What the telescope can assure us of ; what the microscope can assure us of ; what we can be assured of by chemical tests ; what we can be assured of by careful induction produced by long and accurate observation — as to all these lines of information experts are summoned to give their testimony under oath. They are, in the main, highly cultivated men, sensitively conscientious. They are usually selected from among the front ranks of their class. They have ample time given to them for their investigations. They are liberally paid for their services, so as to enable them to take any trouble requisite for their special inquiries. Yet, notwithstanding this, there is scarcely a case in which expert testimony is summoned where we do not find, after two or three experts have testified on one side, about the same number ready to testify on the other side. Not only do they give us their evidence, however positive may be their assertions, probable proof as distinguished from absolute demonstration, but, when we weigh their testimony, we find that we have to add to the doubt incident to all probable proof a new set of doubts as to the authority of the several experts.¹

¹ See *infra*, § 420.

Human disease, to take a prominent illustration, is an object to which physical science has been directed for centuries, and is the topic in which, of all that concern it, society feels the

deepest interest. On the education of those devoting themselves to this study the greatest care and expense have been lavished ; they have been protected by legislation from the intrusion of impostors or of persons im-

§ 10. Much embarrassment has arisen from the position advanced by two eminent text writers,¹ that, to justify the inference of legal guilt from *circumstantial* evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other

Fallacy of distinction between "direct" and "circumstantial" evidence.

perfectly trained; they constitute a profession not only highly honorable and generously remunerated, but embracing some of the most intelligent, cultivated, benevolent, and high-minded men who adorn society. Yet not only does medical science in our generation reject the remedies which in a previous generation it regarded as indispensable, but in every litigated issue of medicine or surgery eminent specialists are found to testify on either side. Is it material to determine, as in Fisk's case, whether death was caused by the assassin's pistol or by the maltreatment of the attending surgeon? Two or three specialists are called by the defence to swear that it was maltreatment that caused the death, and then about as many by the prosecution, to swear that the death flowed in immediate sequence from the pistol wound. Is it essential to know whether certain symptoms in a sick person were produced by a particular poison? Then, as in Palmer's case, we have the same inevitable conflict. That such should be the case; that physical science should be elastic and progressive; that it should move onward, as do all other sciences, with fluctuating step; that its advance should be attended with collision in its ranks; that it should be incapable of demonstrating any fact which touches moral agency so as to make that fact appear absolutely true — in this it answers to the conditions of all sciences affecting humanity, which,

the moment they penetrate the atmosphere that encompasses moral action, are enveloped in the hazes of that atmosphere, and move tremulously, and occasionally with mistaken step. They can, therefore, only reach results which, however probable, are open to doubt and contradiction.

The microscope, also, is supposed to give exact results, and the discoveries of the microscope, as well as of the telescope, are frequently spoken of as demonstrations. Yet what more important question can the microscope approach than that which relates to the distinguishing qualities of human blood, and what more important issue can there be than that which is presented when the life of a human being on trial is made to depend upon the testimony of a microscopist? But, when entering this critical region, the microscopist, no matter how exquisite his instruments, and no matter how ostensibly exhaustive and decisive his tests, finds that he is beset with the infirmities affecting other specialists when deposing as to the application of theory to human life. His sight becomes uncertain, and his utterance indistinct. Sometimes, indeed, we have displayed to us experts boldly swearing on the one side that certain dry blood is human, and experts on the other side swearing with equal boldness that it is not human. But, as a general rule, the accomplished and conscientious expert is obliged to admit that, no matter how accurate may be his

¹ Wills on Circum. Ev. p. 149; Starkie on Ev. p. 838.

reasonable hypothesis than that of his guilt. Judges, on hearing these expressions, have been apt, in the hurry of a trial, to

tests speculatively, they are not such as to produce that certainty which would make them a safe basis for conviction. See *infra*, § 777.

A suit was brought, in 1868, in the United States Circuit Court, in Boston, by a lady of New York, to recover her deceased aunt's estate, amounting to two millions of dollars. The plaintiff's case rested on two writings, by which it was alleged the aunt agreed, in consideration of a will concurrently executed by the niece in favor of the aunt, to leave her entire estate to the niece, and to do nothing to revoke a prior will to that effect in the niece's hands. The defendants set up a subsequent will by the aunt, by which half of the aunt's property was given to the niece, the remainder being distributed among the testator's relatives and friends; and it was maintained by the defendants that the alleged writings on which the plaintiff relied, as binding the testator to make no subsequent will, were forgeries. Upon this issue a vast amount of evidence was taken. The defendants' case was that the signatures to the contested documents not only bore on their face, in the shape of the letters, the marks of forgery, but that they were evidently produced by being traced over the signature to the prior undisputed will in the niece's possession. Three distinct lines of expert testimony were invoked. The first was as to whether the contested signatures, compared with other signatures of the testator, were on their face forgeries; and whether (apart from the question of tracing) they bore the marks of the constraint and hesitancy which distinguish forged writings. The testimony be-

ing before an examiner, who had no power to exclude on the ground of cumulativeness, the parties ransacked the land for witnesses whose authority, in this respect, would be likely to have weight. Photographers and other artists were employed to reproduce, in various exaggerated scales, the signatures, and then testimony was taken by each side to prove and to disprove the allegation that the photographers employed on the other side were not reliable. Presidents of commercial colleges and teachers of penmanship gave weeks of uninterrupted study to the contested writings, and the standards with which they were to be compared. Bank presidents and bank tellers were examined and cross-examined for the same purpose. Engravers, who had spent years in poring over lines of writings and of drawings, and whose eyes were trained to such exquisite delicacy of perception, that the faintest aberrations could be discovered by them, were also summoned to give their aid. The result of the combination of testimony was, that about as many experts were produced to swear that the contested signatures were forged, as there were to swear that they were genuine.

But this was followed by a still more extraordinary conflict. If there is anything demonstrable we should hold that whether one line coincides with another could be demonstrated. In the case before us, a million of dollars hung upon the question whether the words of the testator's name, in the contested writings, exactly coincided with the same name in the uncontested will held by the plaintiff. Upon this question an eminent

accept and apply them; and hence have sprung up a series of dicta to the effect that circumstantial evidence is to be viewed

professor of Harvard College, deservedly one of the most authoritative of living mathematicians, was called, and testified that the chance of the genuine production of such a coincidence as that of the three signatures was that of one to two thousand six hundred and sixty-six millions of millions of millions of times (2,666,000,000,000,000,000,000,000). He naturally added that "this number far transcends human experience. So vast an improbability is practically an impossibility. Such evanescent shadows of probability cannot belong to actual life. . . . Under a solemn sense of the responsibility involved in the assertion, I declare that the coincidence which has here occurred must have had its origin in an intention to produce it." He added that there were other conditions which multiplied the improbability of undesigned coincidence by at least two hundred millions. His testimony was sustained by that of another distinguished mathematical professor, and by that of microscopists and experts in penmanship, who swore that the two signatures alleged to be spurious coincided exactly with the standard from which it was assumed they were copied. On the other side, to meet this testimony, the plaintiff produced a series of signatures of John Quincy Adams, of George C. Wilde, of C. A. Walker, and of the examining magistrate, F. W. Palfrey, in which, even when greatly enlarged by photographs, there were many cases of coincidence sworn by experts to be far more exact than those to which had been assigned so high a standard of improbability. And as to the particular signatures immediately in dispute, there was a

mass of expert testimony to the effect that, so far from coinciding, no single letter in them exactly covered the alleged standard. Yet this is a question on which, beyond all others, we might suppose it possible to obtain demonstration.

The remaining conflict is, if possible, even still more extraordinary. Were the marks of tracing discoverable under the ink of the disputed signatures? If such tracing is apparent to one microscopist, we would suppose that it would be apparent to other microscopists, using instruments of similar grade, and with the same power of eyesight. Yet we have Dr. Charles T. Jackson, a specialist in this line of extraordinary skill and reputation, backed by other experts of distinction, testifying positively and unreservedly that under the ink of the disputed signatures the microscope brought to light marks of tracing; while Professor Agassiz and Professor Oliver Wendell Holmes testified that the microscope brought to light no such marks. It would be impossible to select experts more eminent and more unimpeachable. Yet on a question which we should suppose to be peculiarly susceptible of demonstration, — whether a particular microscope can detect certain marks, — these experts, in the most unqualified manner, testify to contradictory opposites. Of this contradiction there is but one explanation. When even the most exact of physical sciences undertakes to enter into practical life, it is beset with the same incertitudes that beset whatever appeals to our moral judgment. It can demonstrate only things that do not affect our action. As to things that affect our action, or concern liti-

with distrust, and that, to justify a conviction on circumstantial evidence, it is necessary to exclude every possible hypothesis of innocence.¹ It may relieve some difficulty, in meeting gated issues, the best it can do is to establish a preponderance of proof.

For an interesting review of this important case see 4 Am. Law Jour. 625; and for the ruling of the Circuit Court of the United States, by which the case was dismissed on technical grounds, see *Robinson v. Mandell*, 3 Cliff. 169. Compare article in Princeton Review for July, 1878, from which several points in this note are taken.

"It is very curious how often the most acute and powerful intellects have gone astray in the calculation of probabilities. Seldom was Pascal mistaken, yet he inaugurated the science with a mistaken solution. Montucla, *Histoire des Mathematiques*, vol. iii. p. 386. Leibnitz fell into the extraordinary blunder of thinking that the number twelve was as probable a result in the throwing of two dice as the number eleven. Leibnitz Opera, Dutens's edition, vol. vi. part i. p. 217; Todhunter's *History of the Theory of Probability*, p. 48. In not a few cases the false solution first obtained seems more plausible to the present day than the correct one since demonstrated. James Bernoulli candidly records two false solutions of a problem which he at first thought self-evident (Todhunter, pp. 67-9); and he adds an express warning against the risk of error, especially when we attempt to reason on this subject without a rigid adherence to the methodical rules and symbols. Ibid. p. 63. Montmort was not free from similar mistakes (Ibid. p. 100); and as to D'Alembert, great though his reputation was, and perhaps is, he constantly fell into blunders which must diminish the weight of his opinions. Ibid. pp. 258, 259, 286. He

could not perceive, for instance, that the probabilities would be the same when coins are thrown successively as when thrown simultaneously. Todhunter, p. 279." Jevons' *Principles of Science*, i. 244. Compare to the same effect an article by Dr. Peabody in the Princeton Review for March, 1880.

¹ See *Algheri v. State*, 25 Miss. 584; *Houser v. State*, 58 Ga. 78; *Otmer v. People*, 76 Ill. 149; *Mickle v. State*, 27 Ala. 20. In Georgia it is provided by the Constitution that a conviction on "circumstantial" evidence may be commuted. *Merritt v. State*, 52 Ga. 82; *Regular v. State*, 58 Ga. 264.

Judge Story, while admitting the distinction, argues that it is merely one of logic. "It is probable," he says, "that in some few instances, though they have been rare, innocent persons have been convicted, upon circumstantial evidence, of offences which they never committed. The same thing has probably sometimes, though perhaps not more rarely, occurred, where the proofs have been positive and direct from witnesses, who have deliberately sworn falsely to the facts constituting the guilt of the party accused. But to what just conclusion does this tend? Admitting the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare that no human testimony to circumstances or to facts is worthy of belief, or can furnish a just foundation for conviction? That would be to subvert the whole foundations of the administration of public justice. If, on the other hand, such cases are addressed as a mere

such points as these, to keep in mind, in addition to the remarks

admonition to the judgment of the jury, requiring caution on their part in weighing evidence, in order to guard them against the impulses of sudden conclusions and slight suspicions, there is certainly nothing objectionable in the course, although under the solemn circumstances of the present case it seems hardly necessary to enforce an appeal, the importance of which is so deeply felt by all who sit on this trial." *U. S. v. Gibert*, 2 Sumner, 27; *Moore v. State*, 2 Oh. St. 500; *State v. Norwood*, 74 N. C. 247.

To the same effect is the language of Chief Justice Whitman, of Maine. "Circumstantial evidence," he said, "is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud. It was not strange," he said, "that in the vast number of persons who had suffered the penalties of the law, some should have suffered wrongfully." *State v. Thorne*, 6 Law Rep. 54.

"The eye of Omniscience," said Mr. Justice Park, "can alone see the truth in all cases; circumstantial evidence is there out of the question; but clothed as we are with the infirmities of human nature, how are we to get at the truth without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelop human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of those who are most conversant with the administration of justice, and most skilled in judicial proceedings, is much more satisfactory than the testimony of a

single individual who swears that he has seen a fact committed." *Wills on Cir. Ev.* 188.

"Circumstantial evidence," said Gibson, C. J., in a capital case, in his charge to the jury, "is in the *abstract* nearly, though perhaps not altogether, as strong as positive evidence; in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye-witness of unblemished character is not so satisfactorily proved, as a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of doubtful credibility. Indeed, I scarcely know whether there is any such thing as evidence purely positive. You see a man discharge a gun at another; you see the flash, you hear the report, you see the person fall a lifeless corpse, and you *INFER* from all these circumstances that there was a ball discharged from the gun, which entered his body and caused his death, because such is the usual and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body of the slain; and your testimony to the fact of killing is thereby only inferential—in other words, circumstantial. It is *possible* that no ball was in the gun, and we *INFER* that there was, only because we cannot account for the death on any other supposition. In cases of death from the concussion of the brain, strong doubts have been raised by physicians, founded on appearances verified by post-mortem examinations, whether an accommodating apoplexy had not stepped in at the nick of time to prevent the prisoner from killing him, after the skull had been broken into pieces. I remember to have heard it doubted in this court-room, whether the death of a man, whose brains

made in the sections immediately preceding, the following propositions : —

oozed through a hole in his skull, was caused by the wound or a misapplication of the dressing." (A remarkable illustration of this will be found in *Mitchum v. State*, 11 Ga. 615). "To some extent, however, the proof of the cause which produced the death rested on circumstantial evidence.

"The only difference between positive and circumstantial evidence is, that the former is more immediate and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact, as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect; but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam-engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What, then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief — that is, actual and not technical disbelief; for he who is to pass on the question is not at liberty

to disbelieve as a juror while he believes as a man." (See comments on this expression by Dillon, J. 20 Iowa, 90.) "It is enough that his conscience is clear. Certain cases of circumstantial proofs to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offences capital. The wonder is that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence. If the evidence in this case convinces you that the prisoner killed her child, although there has been no eye-witness of the fact, you are bound to find her guilty." *Com. v. Harman*, 4 Barr, 269. See also *M'Cann v. State*, 13 Sm. & M. 471; and the judicious remarks of Shaw, C. J., in *Com. v. Webster*, 5 Cush. 335; Bemis's Webster case, 462-4.

As agreeing in the main with the text may be cited the following criticism of Sir J. Stephen, *Crim. Law*, p. 266: "The distinction which writers on circumstantial evidence have in their minds is, in fact, a double distinction. In some crimes the whole transaction is continuous, in others it is discontinuous; and of course where it is discontinuous, the different items of evidence are proportionably numerous, and require a greater degree of inference and combination, than where

§ 11. There is no evidence admissible in a court of justice that does not depend more or less on circumstances for credit.¹ Let us, as the simplest illustration, suppose that an eye-witness testifies that he saw A. kill B. by a

All evidence is circumstantial.

all the facts lie together in one group. The indiscriminate application of the phrase 'circumstantial evidence' to cases of discontinuous crimes, and to the cases in which the evidence of the transaction, continuous or not, is incomplete, conceals the distinction between continuous and discontinuous crimes, which is not without importance, and slurs over the fact that juries may have to act on incomplete evidence.

"Even, however, if the term were confined to the case of continuous crimes proved without the evidence of eye-witnesses to those parts of the crime which are essential to its legal definition, it is open to serious objections. It is not correct to speak of any visible occurrences as constituting crimes, either by themselves or collectively. A mental element is a necessary part of every crime. Malice, either in its general shape, or in some specific shape, must be combined with external bodily motions, in order to make them criminal, and the existence of the states of mind has always to be inferred from circumstances. In this sense all evidence whatever is circumstantial, and no room is left for the distinction. This is not a mere verbal objection. . . .

"Waiving all objections to the use of the term," so this vigorous writer says at another point, "and assuming that there is a real distinction between circumstantial and direct evidence, is there any important difference corresponding to the distinction? There is no sort of difference between the cogency of the different kinds of evidence, whether the comparison is

made between weak cases or strong ones.

"Compare two strong cases. How is it possible to say whether the evidence of several credible witnesses, who say they saw a man put his hand into another man's pocket and take out his purse and run away, is stronger or weaker than that of the same number of equally respectable witnesses, who prove that the purse was taken, and that immediately afterwards the prisoner was seen running away, and on being stopped was found to have the purse in a secret pocket, no explanation being given. Or take two weak cases. A man swears that he was robbed on a dark night, and that the prisoner is the man who robbed him. The light by which he saw him was the reflection of a furnace a long way off, which would cast a light at once strong and unsteady, and the robber was exposed to it only for a moment.

"A sack is stolen, and is found three months afterwards, apparently concealed, in the house of a marine store-dealer. He says something on the subject which may be, and probably is, a lie. Other people had access to the place where the sack was found. Which of these cases is the stronger of the two? Their relative strength cannot be shown to depend in any way on the properties of either direct or circumstantial evidence, as such." See Steph. Dig. Cr. Law, p. 266.

¹ See *Com. v. Malone*, 114 Mass. 295. Compare, on the topic in the text, the introductory sections discussing presumptions in the closing chapter of this volume, §§ 707 *et seq.*

gun shot. Now, in order to sustain a conviction on such evidence the following conditions must be established: —

§ 12. First, it must appear that the deceased died from the shot.¹ “I saw the gun aimed: I heard the report: I saw the man fall; I saw the wound.” But what are these, argues Chief Justice Gibson, in a remarkable opinion just quoted,² but circumstances from which you *infer* a certain result? The deceased may have expired from fright, as has been sometimes the case in executions, before he was struck by the fatal shot. He may have only been in a trance, and was killed really by the surgeon who probed the wound. Among cases of violent deaths, perhaps only one in ten thousand may have been thus caused. But if it is one to ten thousand that the death may be traced to such a cause, then there is a possible, though improbable, hypothesis inconsistent with the defendant’s guilt.³

§ 13. But another step is necessary to produce a conviction of the party charged. It is necessary to prove not only that the deceased died by violence from the hand of a person having a specific appearance, but that the defendant at the bar is the person by whom the death of the deceased was caused.⁴ But here comes another question of inference. Is the defendant the person by whom the shot was fired? Supposing that the day was clear, and the witness near at hand; supposing that the witness was dispassionate, collected, observant, and unbiased, — points which will be hereafter discussed, — are men always so distinctly individuated that one can under no circumstances be mistaken for another? Men’s faces and figures, like their handwritings, may sometimes be so similar that the keenest observer is baffled when seeking to discover a difference.⁵ The witness is asked how he knows that the prisoner at the bar is the person who fired the fatal shot; and his answer is, “I infer it from a similarity of eyes, of hair, of height, of

¹ See *supra*, § 9.

² *Com. v. Harman*, 4 Barr, 269.

³ See *Campbell v. State*, 23 Ala. 44; *Mitchum v. State*, 11 Ga. 615.

⁴ As to identity see *infra*, §§ 27, 806. That such proof is inferential see *R. v. Cheverton*, 2 F. & F. 833;

McCulloch v. State, 48 Ind. 109. As to identification by voice see *Com. v. Scott*, 123 Mass. 222; *Brown v. Com.* 76 Penn. St. 319. As to identification of deceased person see *infra*, §§ 326, 804.

⁵ See, on this point, 2 Wh. & St. Med. Jur. §§ 289, 1218.

manner, of expression, of dress." Human identity, therefore, is an inference drawn from a series of facts, some of them veiled it may be by disguise, and all of them more or less varied by circumstances. In addition, therefore, to the inference drawn as to the connection of the shot and the death, we have another inference to be made circumstantially as to the identity of the shooter with the defendant on trial. "As Mr. Mill remarks, it is too much to say, 'I saw my brother.' All I positively know is that I saw some one who closely resembled my brother as far as could be observed. It is by judgment only I can assert he was my brother, and that judgment may possibly be wrong."¹

§ 14. But to justify a conviction, a step further must be taken. One who performs a guilty act under compulsion is not amenable to punishment. It is necessary, therefore, to distinguish the case before us from that of a public execution, or that of a man pressed to the wall by an assailant. "The prisoner," says the witness, "shot the deceased without necessity, and without compulsion." But how do you know

And so of
his free
agency.

¹ Jevons' Logic, Less. xxvii. 6.

A mother's testimony in identification of her son might be considered direct in the strongest sense. Yet Lady Tichborne's recognition of the claimant as her son was so weakened by the circumstances of the case, — her own passionate desire to recover her lost child, and the arts shown to have been resorted to by the claimant to deceive her, — that it was in an eminent degree open to the criticism which is applied to "circumstantial" evidence by those who hold to the distinction between "direct" and "circumstantial." The fact is that in both the Tichborne trials the testimony for the claimant was mainly what is called "direct," consisting of testimony by witnesses most of whom were unimpeachable, that he was Roger Tichborne. The effective testimony on the other side was mainly "circumstantial," *e. g.* proof of the disparity between the size of the claimant's feet and that

of Roger, as given by the latter's shoemaker, the claimant's ignorance of Roger's early history, and the absence on his person of certain marks that were on the person of Roger. But what is called "direct" testimony as to identity is really only secondary circumstantial evidence. In other words, it is the opinion of a witness drawn from certain circumstances. The same criticism is applicable to the testimony of accomplices to identity. It is called "direct" by those who hold to the distinction here excepted to; yet no testimony depends for credit more exclusively on circumstances. See *Com. v. Cunningham*, 104 Mass. 548, which held that where the only question is as to the identity of the prisoner with the guilty party, the jury may be justified in returning a verdict of guilty, although no witness will swear positively to the identity. Compare *infra*, § 806, as to presumption of identity.

this? Can a conclusion as to such an issue be reached except by inference? And yet, does not such an issue arise, explicitly or implicitly, in every criminal trial? We have, therefore, another inference to add to those already enumerated: an inference drawn only from circumstances.

§ 15. Then comes another step: was the defendant responsible? It is true that the law presumes sanity from every rational act. But was the homicide in question a rational act? Are there not some homicides, — *e. g.* a wife and mother, in her own home of comfort, killing her new-born child, — which on their face are insane acts; and is there any one who would question Judge Story's humane declaration that in such a case we must infer insanity? In other words, in certain acts we infer sanity; in other acts, insanity, but it is inference in either case. Of course when we invoke the prisoner's past history, and collect facts from which to draw our conclusions, then the evidence must on all sides be admitted to be what is called "circumstantial." But even as to the conclusion of the eye-witness of the homicide, and as to the conclusions we draw from *his* conclusion, the process, also, must be circumstantial. It is an inference drawn from circumstances, — from a narrow range of circumstances, but from circumstances still. Here, then, is a fourth inference to be made, and a fourth possibility of innocence to be set aside, before we can convict upon what is called direct testimony.

§ 16. Yet there is another constituent of guilt to be proved; and this a constituent which, as all parties agree, the prosecution must make out, — the constituent of *intent*. In most indictments intent is averred or implied; in all such cases it must be proved by the prosecution. Yet what human eye has witnessed the processes of intent in another's mind? It may be said that intent is to be inferred from an intelligent act, and so it is; but so far as concerns the question before us, this is a *petitio principii*, because if you ask the witness how he knows the act was intelligent, or if you ask yourself why you infer it was intelligent from what the witness says, the answer is, *circumstances*. Add to a shooting certain circumstances, — *e. g.* a furtive or an angry approach, a careful aim, an accurate use of the weapon, a threat, a subsequent attempt at

flight,—and you make out the homicidal intent. Strip the killing of such circumstances, assume a weapon lifted on the spot without aim, an approach purely fortuitous or friendly, a manner from which no suspicion of attempt can be extracted,—let the case come to you in such a shape, with no effort on the part of the prosecution to make out malice or passion, or to show subsequent consciousness of guilt, and you have a case on which no conviction of malicious homicide could be sustained. Here, then, we have a fifth and most important inference, namely, that of intent, which must be made before conviction.¹

§ 17. Yet even at this point we have not exhausted the inferences to be drawn before the testimony of an eye-witness can be regarded as sufficient to sustain a verdict of guilty. The conditions we have just noticed are those which concern the person charged with a crime; and it has been seen that even if the evidence be that of eye-witnesses, pure and simple, a conviction that he is guilty can only be reached by probable reasoning,—by reasoning consisting, as does all other probable reasoning, of logical induction from circumstances. This, indeed, is a condition necessarily emanating from the subject matter of trial, namely, a supposed moral agent charged with voluntary, intentional crime. Let us next see how the same condition results from the necessary character of all witnesses.²

Witnesses
dependent
on circum-
stances for
credibility.

Now to exclude from the issue all evidence that is called “circumstantial,” we have to suppose the case of a witness who appeals to our credence simply and merely because he is a witness. He is known by no antecedents; there is nothing before us from which his veracity can either be sustained or disputed. For, the moment you add to him such circumstances, the testimony becomes, on all showing, “circumstantial.” Suppose, then, we have present a witness of whom nothing can be known or inferred except that he claims to have seen a certain guilty act; is this testimony on which a conviction can be satisfactorily rested? Strip the major premise in Paley’s famous syllogism of the statement it contains as to the pure characters and holy lives and deaths of the evangelic historians; make it simply read: “No

¹ R. v. Hincks, Canada Q. B. 10; Cent. L. J. 127. ² See *infra*, §§ 369 *et seq.*

man can assert a falsehood: Matthew was a man; therefore Matthew could not assert a falsehood;" and to what does the conclusion amount? The whole force of the reasoning rests upon the character of Matthew and his co-historians: their simplicity, their uniform heroism and coherence in their narration of the disputed facts; the improbability that ethics so lofty and conceptions so sublime should have sprung from men who were consciously fabricating falsehoods; the further improbability that for the sake of such fabrications such men would expose themselves to the infamy and ruin which the promulgators of such statements would invoke. So it is with all other forms which the testimony of eye-witnesses assumes. Suppose the question to be, whether it is more probable that a given abstract man (the witness) should have committed one crime, that of perjury, than that another given abstract man (the defendant) should have committed another crime, that of murder; here, if we divest the issue of all circumstances on either side, there is simply a balance of improbabilities, in weighing which the mind must incline, if it incline at all, to the acquittal of the darker crime.

§ 18. But here, as in scanning the probabilities of guilt in reference to the offender himself, there are other steps to be taken before we can discharge the possibilities of innocence with which the issue is beset. Even supposing we could rest a conviction upon the statement, unsustained by circumstances, of an alleged eye-witness, could we do so without, in the next place, remembering the possibility that such witness may have testified falsely? Perjury, indeed, is never to be presumed; but we cannot shut our eyes to the fact that convictions have sometimes been based on perjured testimony; and though the probability of perjury may be but one to a hundred, yet this is only another way of saying that it is probable to a very high degree, but not certain, that there is no perjury in the testimony brought before in us any given case.¹

§ 19. But if perjury is probable only in the proportion of one to a hundred, is it so with prejudice? The late Mr. John Sergeant, a great and grave jurist, once told a jury, in discussing this kind of evidence, of a trial for damages accruing from collision between two sloops

Prejudice
condi-
tioned by
circum-
stances.

¹ See *infra*, §§ 373 *et seq.*, as to influences leading to perjury.

carrying lawyers to a Circuit Court to be held at Wilmington. The question arose as to which sloop was the aggressor ; and on this question every lawyer swore with his sloop. The difficulty was, not that any one of the lawyers consciously perverted the truth, but that they all were prejudiced, so that the truth was unconsciously perverted by them. More or less does this bias exist in every witness, whether from unconscious prejudice, or from the impossibility of any man using language that exactly expresses the truth. Of unconscious prejudice another illustration may be found in the fact that the purest and most high-minded of experts, in matters involving the identity of handwriting, are known to have much difficulty in divesting their minds of the predisposition to accept as to such identity the view which is unconsciously received by them from the party who first puts the papers in their hands.¹

Of the inadequacy of memory and language exactly to represent a particular scene as it really took place, we have constant illustrations in the cross-examinations and recallings of witnesses during every long contested trial. There is one probability in a hundred that a witness may be perjured ; there is one in fifty or twenty or ten that he may be so prejudiced as unconsciously to misstate ; there is a far higher probability that his statement may not be exactly true.² All these probabilities the jury have to weigh ; and the conclusions they reach must be inferences from circumstances. Even in the case of the abstract witness, without antecedents or circumjacent, whom this hypothesis presents to us, the jury would infer, if such a witness were possible, a want of credibility from the very circumstance that the witness comes forward in this anomalous isolation. But no such witness exists or can exist. Every witness has some circumstances about him from which inferences as to his veracity and capacity may be made. Hence every case depending nominally upon what is called direct testimony, depends really upon that which is circumstantial. Hence if we are to hold that in circumstantial evidence there can be no conviction if the facts "are capable of explanation upon any other reasonable hypothesis than that of guilt," we must hold this to be the case with all evidence.

¹ See *infra*, § 376.

² See *infra*, § 373.

If we do not hold this as to evidence in general, we must not hold it as to that kind of evidence popularly called circumstantial.

§ 20. The conclusion to which the reasoning we have been following leads us is this: All evidence is more or less circumstantial; all statements of witnesses, all conclusions of juries, are the results of inferences. There is therefore no ground for the distinction between "circumstantial" and "direct" evidence. All evidence admitted by the court is to be considered by the jury in making up their verdict; and their duty is to acquit if on such evidence there is reasonable doubt of the defendant's guilt; if otherwise, to convict.¹ It may be objected that the views just expressed land us in scepticism, being destructive of certainty of conclusion. But scepticism, while it frequently results from the assumption that no conclusion is to be believed that is not demonstrated, is reduced within proper bounds by the recognition of the position above stated, that it is only by inference from facts that conclusions as to human actions can be reached. The process has two sides: (1.) The prejudice against what is called "circumstantial" evidence is dispelled. That this prejudice is deeply seated is illustrated by the fact that in some States by statute, or by constitutional provision, capital sentence cannot be awarded when the evidence is only "circumstantial;" though if the fact be, as has just been argued, that no conviction ought to stand that does not rest upon a cumulation of probabilities, it is necessary, in order to carry out the limitations in this respect just noticed, to assign to the word "circumstantial" a meaning very different from that assigned to it in this chapter.² But aside from positive limitations there is

¹ The following cases may be consulted as to the points made in the text: *State v. Daley*, 41 Vt. 564; *Com. v. Annis*, 15 Gray, 197; *Com. v. Drum*, 58 Penn. St. 9; *Schusler v. State*, 29 Ind. 394; *Kingen v. State*, 45 Ind. 510; *State v. Johnson*, 19 Iowa, 230; *State v. Collins*, 20 Iowa, 85; *Orr v. State*, 34 Ga. 342; *Martin v. State*, 38 Ga. 293; *Hall v. State*, 40 Ala. 698; *Mose v. State*, 36 Ala. 211;

Chisholm v. State, 45 Ala. 66; *Coffman v. Com.* 10 Bush, 495; *Phipps v. State*, 3 Cold. (Tenn.) 344; *Conner v. State*, 34 Tex. 659; *Bowler v. State*, 41 Miss. 570; *People v. Strong*, 30 Cal. 151; *People v. Dick*, 32 Cal. 213; *People v. Cronin*, 34 Cal. 191.

² The difficulty, in these States, may be obviated by regarding the term "circumstantial evidence" as

a superstition with regard to "circumstantial" evidence which often prevents conscientious jurors from rendering convictions in cases in which justice demands such convictions. To avert such perversions of justice it is important that it should be understood that all trustworthy evidence derives its credit from facts. (2.) The equally superstitious assignment of peculiar sanctity to the testimony of eye-witnesses, by which unjust convictions have been secured, will also be dispelled. A jury will not, if rightly advised in this relation, feel bound to find its verdict on grounds other than those on which its members would form conclusions on matters of every day life. And the position is reached that the reasoning in courts of justice is the reasoning of common sense, by which men of common sense and justice are guided in forming their opinions as to the conduct of others. Certain exclusionary limits, indeed, are adopted, by which hearsay and irrelevant matter are shut out. But these exclusions will be found, when examined, to be based on common sense; and when the best evidence which the nature of the case permits is brought in, and irrelevant matters are excluded, then the reasoning which the jury is to apply is not fettered by artificial and arbitrary rules, but is that which is usual in all matters in which solemn judgments are reached out of court.

§ 21. The evidence on trial consisting, therefore, of a series of facts more or less closely connected, argument consists in the application to these facts of particular hypotheses; and in criminal issues, if there be no probable hypothesis of guilt consistent, beyond reasonable doubt, with the facts of the case, the defendant must be acquitted.¹ But this is not the only use of hypothesis. It is only by appealing to hypothesis that questions of relevancy, as will presently be more fully seen, can be determined. "My hypothesis," so argues the prosecution, "is that the act charged is part of a system of guilty acts." To support such an hypothesis, proof of such a system is relevant.² Or the defence argues, "No man of good character

Juridical
value of
hypothesis.

convertible with "evidence which cases there should be no conviction admits of a probable solution not at all. consistent with guilt." But in such

¹ See *Beavers v. State*, 58 Ind. 530.

² *Infra*, § 32.

would commit a crime such as is here charged," and to sustain this hypothesis evidence of good character is relevant.¹ Hypothesis, thus, is the basis on which admissibility of evidence must rest, as it is the basis on which must rest either acquittal or conviction.

¹ *Infra*, § 57.

CHAPTER II.

RELEVANCY.

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§ 23. RELEVANCY is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which logically affects the issue.¹ A person is found dead, for instance, with marks of violence on his body, and at once a series of hypotheses are tried in turn, as keys to a lock, to see if they will disclose the secret of the death. Were the wounds homicidal or suicidal? If homicidal, was the motive avarice, or jealousy, or an old grudge? If a person is on trial for the homicide, then against him are admissible all facts that sustain any hypothesis which implies his guilt. When it is his turn to develop his defence, then any facts are admissible that would sustain the hypothesis of his innocence.

§ 24. Relevancy is therefore to be determined by free logic, unless otherwise settled by statute or controlling precedent. All facts, that go either to sustain or impeach a hypothesis logically pertinent, are admissible.² But

¹ See, as to hypothesis, *supra*, § 21.

² Whart. on Ev. § 21; *R. v. Pearce*, Pea. R. 75; *R. v. Egerton*, R. & R. 375, cited by Holroyd, J., in *R. v. Ellis*, 6 B. & C. 148; *R. v. Briggs*, 2 M. & Rob. 199, per Alderson, B.; *R. v. Rooney*, 7 C. & P. 517; *R. v. Furse*, 6 C. & P. 81; *Anglesey v. Hatherton*, 10 M. & W. 235, per Ld. Abinger; *Furneaux v. Hutchins*, 2 Cowp. 807; *Doe v. Sisson*, 12 East, 62; *Schuchardt v. Allens*, 1 Wall. 359; *Butler v. Watkins*, 13 Wall. 457; *Deutsch v. Wiggins*, 15 Wall. 540; *Hovey v. Grant*, 52 N. H. 569; *Raynes v. Bennett*, 114 Mass. 424; *Com. v. Dowdican*, 114 Mass. 257; *Huntsman v. Nichols*, 116 Mass. 521; *Willis v. Hulbert*, 117 Mass. 151; *Com. v. Sturivant*, 117 Mass. 122; *Com. v. Costley*, 118 Mass. 1; *Com. v. Adams*, 127 Mass. 15; *Blanchard v. N. J. S.* 59 N. Y. 292; *Pratt v. Richards*, 69 Penn. St. 53; *Thompson v. Stevens*, 71 Penn. St. 161; *Brooke v. Winters*, 39 Md. 505; *Welch v. Ware*, 32 Mich. 77; *Marquette R. R. v. Langton*, 32 Mich. 251; *Willoughby v. Dewey*, 54

Ill. 266; *Hough v. Cook*, 69 Ill. 581; *Hancock v. Wilson*, 39 Iowa, 47; *Johnson v. Filkington*, 39 Wis. 62; *Selma v. Keith*, 53 Ga. 178; *State v. Clifton*, 30 La. An. 951; *State v. Corsell*, 12 Nev. 337.

As to inferences of this class see *infra*, §§ 734 *et seq.*; and see *Com. v. Piper*, 120 Mass. 185; *Murphy v. People*, 63 N. Y. 590; *Long v. State*, 52 Miss. 23.

A party, for instance, is charged with the robbery of a watch and chain, which, by the hypothesis of the prosecution, were torn from the prosecutor at a particular place. It is admissible, in such case, for the prosecution to put in evidence the fact that at that very spot was found a ring, such as is used to fasten watches, and which the prosecutor could not distinguish from his own, which had the appearance of having been forcibly wrenched. *Com. v. Watson*, 109 Mass. 354. See also *Com. v. Tolliver*, 119 Mass. 312. Compare *infra*, §§ 816 *et seq.*; *People v. Collins*, 48 Cal. 277.

It is also relevant, when the prose-

no fact is relevant which does not make more or less probable such a hypothesis.¹ Relevancy, therefore, involves two distinct inquiries to be determined by logic, unless otherwise arbitrarily prescribed by jurisprudence: (1.) Ought the hypothesis proposed, if proved, to affect the issue? (2.) Does the fact offered in evidence go to sustain this hypothesis? ²

§ 25. What has been said applies to all lines of investigation of truth.³ Certain exclusionary limits are indeed to be firmly imposed. We must refuse to admit secondary evidence, or evidence of independent crimes, on the part of the party charged. But aside from these limitations, which are exacted by the policy of the law, the tests we apply in jurisprudence are the tests we apply in historical and social criticism. Lord Bacon's alleged venality, for instance, is to be proved or disproved by the historical critics by the same kind of induction we would apply were he now to be impeached for the same offence before the House of Lords; and whatever facts are admissible, as yielding a logical inference in the former case, are admissible as yielding a legal inference in the latter case. A stone claimed to be a petrified giant is produced; whatever facts would be relevant on the question of this pretension, viewing the question as a matter of scientific criti-

Process is logical, and applicable to all lines of investigation.

cution proves that the defendant went to a particular place to commit a crime, for the defendant to prove that he went there on legitimate business. *State v. English*, 67 Mo. 137.

When the prosecution puts in evidence motives likely to have prompted the defendant to the act charged, it is relevant for the defendant to put in evidence stronger motives operating on others; *State v. Johnson*, 30 La. An. 921; or counter motives operating on himself. *R. v. Grant*, 4 F. & F. 322.

On a trial for murder, where the defendant sets up suicide, it is admissible for him to put in evidence the prior tendency to melancholy on part of the deceased. *Blackburn v. State*, 23 Oh. St. 146.

The defence, on the trial of A. for killing his wife, having relied on his offer to return to her (after a long separation), as a mark of friendliness, which she repelled, it was held relevant, on the part of the prosecution, to put in evidence the bank deposit books of husband and wife, to show that the latter had, and the former had not, money. *Sayres v. Com.* 88 Penn. St. 291.

¹ See cases in Whart. on Ev. § 22.

² Thus on an indictment for a negligent collision, when the only charge in the indictment is that the defendant ran the train with unreasonable speed, evidence of neglect to ring the bell is inadmissible. *Com. v. Fitchburg R. R.* 126 Mass. 472.

³ Whart. on Ev. § 22.

cism, would be relevant if the supposed fabricator of the giant was on his trial for a cheat. The facts which a sound historical critic would adduce, as bearing on the guilt of Queen Caroline or of Warren Hastings, would be held relevant by a court to whom the trial of Queen Caroline or of Warren Hastings should be committed.

§ 26. A similar series of progressive tests may be applied in order to exhibit the meaning of any controverted writing.¹ A memorandum, for instance, in a foreign language, is put in evidence, for the purpose of proving a debt. The plaintiff sets up, first, that the instrument is, we may say, in German; secondly, that certain phrases in it have, by the custom of trade, a meaning different from that they bear in ordinary use. Here are two hypotheses successively presented in order to get at the meaning of the instrument; and whatever goes to prove either of these hypotheses is relevant. The number of the hypotheses increases with the complication of the case. If, for instance, Sir Philip Francis's title to the authorship of Junius is under investigation, we have a series of concentric hypotheses, each of which is pertinent, and the innermost of which closely surrounds the point of identity. It is pertinent to argue that the author of Junius, during the Chatham and Grafton ministries, was familiar with English public life; that he possessed a practised pen; that he was cognizant of the traditions of the war-office; that his animosity to Lord Mansfield, and his attachment to Lord Chatham, were strong; that he had cogent motives for concealment both at that particular period and for years afterwards; that he ceased to write about 1773; that his writing had certain marked peculiarities. Each of these hypotheses being pertinent, it is relevant to prove that Sir Philip Francis was, during the period when the Junius Letters appeared, familiar with English public life; that his style was polished, vigorous, and not unlike that of Junius; that he had been for some time a clerk in the war-office; that his political relations repelled him from Lord Mansfield and connected him with Lord Chatham; that to him discovery would be political ruin; that about the time the Junius Letters closed

¹ See Froude's marshalling of the Casket Letters in the 7th volume of arguments as to the genuineness of the his History of England.

he left the country ; that his handwriting was strikingly similar to that of Junius.

§ 27. In questions of identity we have abundant illustrations of the principles just announced.¹ No matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made. One hundred thousand persons may be in a city at the time when in that city a particular crime is committed, and proving A. to have been in the city at the time makes a case against him, as perpetrator, which is by itself only as one against one hundred thousand ; yet it is nevertheless relevant to prove that he was at the time in the city. Multitudes of persons having to work with kerosene have kerosene stains on their clothes, yet, when on the trial of a person charged with burning a house, the hypothesis of the prosecution is that an accomplice of the defendant fired the building by means of a can of kerosene oil furnished for the purpose by the defendant, it is relevant for the prosecution to prove that the shirt of the alleged accomplice had on it kerosene stains.²

So by questions of identity.

§ 28. Conditions, the presence or absence of which may be thus proved, may be regarded as prior, contemporaneous, or subsequent. A homicide, for instance, is committed, and is charged upon a particular individual on trial. Among the prior conditions of the homicide we may notice preparations and indications of enmity ; among the contemporaneous conditions is collision between the parties ; among the subsequent conditions are confessions and attempts at flight.³

Conditions may be prior, contemporaneous, or subsequent.

§ 29. No fact, as already seen, which, on principles of sound logic, does not sustain or impeach a pertinent hypothesis, is relevant, and no such fact, therefore, unless otherwise provided by some positive prescription of law, should be admitted as evidence on a trial. The reasons for this rule are obvious. To admit evidence of such collateral facts would be to oppress the party implicated by trying him on a case for preparing which he has had no notice, and sometimes

Collateral disconnected facts generally irrelevant.

¹ See *supra*, § 13; *infra*, §§ 47, 806.

² See *infra*, §§ 742 *et seq.*

³ *State v. Kingsbury*, 58 Me. 239.

See *infra*, § 776.

by prejudicing the jury against him by publishing offences of which, even if guilty, he may have long since repented, or which may have long since been condoned. Trials would by this process be injuriously prolonged, the real issue obscured, verdicts taken on side issues. To sustain the introduction of such facts, they must be in some way capable, as will presently be seen more fully, of being brought into a common system with that under trial.¹

§ 30. In criminal cases there are peculiar reasons why the test before us should be applied to proof of collateral crimes. Hence collateral crimes are inadmissible. A defendant ought not to be convicted of the offence charged simply because he has been guilty of another offence. Hence, when offered simply for the purpose of proving his commission of the offence on trial, evidence of his participation, either in act or design, in commission or in preparation, in other independent crimes, cannot be received.²

§ 31. Certain exceptions exist, however, to the rule just stated, which we will now proceed to discuss : —

Exception when extraneous crime (1.) When an extraneous crime forms part of the *res gestae* evidence of it is not excluded by the fact that it

¹ Griffiths v. Payne, 11 A. & E. 131; Thompson v. Mosely, 5 C. & P. 502; R. v. Mobbs, 6 Cox C. C. 223; R. v. Dossett, 2 C. & K. 306; State v. Whittier, 8 Shepl. 341; State v. Lapage, 57 N. H. 245; Com. v. Call, 21 Pick. 515; Com. v. Campbell, 7 Allen, 541; Goodrich v. Wilson, 119 Mass. 429; Com. v. Miller, 3 Cush. 243; Com. v. Blair, 123 Mass. 242; Williams v. Fitch, 18 N. Y. 546; Mailler v. Propeller Co. 61 N. Y. 312; Cole v. Com. 5 Grat. 696; Farrer v. State, 2 Oh. St. 54; State v. Miller, 47 Wis. 930; Tharp v. State, 15 Ala. 749; Brock v. State, 26 Ala. 104; Hall v. State, 51 Ala. 9; Williams v. State, 45 Ala. 57; Cesure v. State, 1 Tex. Ap. 19. See Iron Mountain Bk. v. Murdock, 62 Mo. 70.

² R. v. Mobbs, 6 Cox C. C. 223; State v. Lapage, 57 N. H. 245; Com. v. Wilson, 2 Cush. 590; Com. v. Mil-

ler, 3 Cush. 243; Coleman v. People, 55 N. Y. 81; People v. Corbin, 56 N. Y. 363; Rosenweig v. People, 63 Barb. 634; Snyder v. Com. 85 Penn. St. 519; Walker v. Com. 1 Leigh, 574; Cole v. Com. 5 Grat. 696; State v. Merrill, 2 Dev. 259; State v. Shuford, 69 N. C. 486; Stone v. State, 4 Humph. 27; Kinchelow v. State, 5 Humph. 9; Brock v. State, 26 Ala. 104; Dunn v. State, 2 Pike, 229; Barton v. State, 18 Ohio, 221; Farrer v. State, 2 Oh. St. 54; Coble v. State, 31 Oh. St. 100; Bonsall v. State, 35 Ind. 460; Sutton v. Johnson, 62 Ill. 209; Garrison v. State 87 Ill. 96; Barnes v. People, 48 Cal. 551; People v. Bowen, 49 Cal. 654; Cesure v. State, 1 Tex. Ap. 11. See article in Cent. Law J. May 24, 1878. Threats to commit collateral crimes fall under the same head. Ogletree v. State, 28 Ala. 683.

is extraneous.¹ Thus, on a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person, was held admissible, under the circumstances of the case, notwithstanding the evidence tended to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction.² On a trial, also, for breaking into a booking office of a railway station, evidence was admitted that the prisoners had, on the same night, broken into three other booking offices of three other stations on the same railway, the four cases being connected.³

Again, on an indictment for arson, in setting fire to a rick, the property of A., it was ruled that evidence could be given of the prisoner's presence and demeanor at fires of other ricks, the property respectively of B. and C., occurring the same night, although those fires were the subject of other indictments against the prisoner, such evidence being important to explain his movements and general conduct before and after the fire of A.'s rick.⁴ It has also been held admissible, on a trial for murder, to prove that the crime was part of a general conspiracy to kill certain obnoxious persons in a wide section of country.⁵ An offer to bribe, also, and an attempt to escape from commitment for a different offence, are admissible on the trial of the latter offence, when all the offences are connected in one transaction.⁶ And whatever forms part of the preparation of a crime is admissible as material from which the motive of the crime may be inferred.⁷

§ 32. (2.) Suppose that it is alleged that the crime in ques-

¹ *Com. v. Sturtivant*, 117 Mass. 122; *Gassenheimer v. State*, 52 Ala. 314; *State v. Folwell*, 14 Kans. 105. As to scope of *res gestae* see *infra*, § 264.

² *Heath v. Com.* 1 Rob. (Va.) 735. See *Walters v. People*, 6 Parker C. R. 15; *State v. Rash*, 12 Ired. 382; *Johnson v. State*, 17 Ala. 618. See *R. v. Voke*, R. & R. 531.

³ *R. v. Cobden*, 8 F. & F. 883. See *R. v. Rearden*, 4 F. & F. 76.

⁴ *R. v. Taylor*, 5 Cox C. C. 138. It was, however, held, in conformity

with the views heretofore expressed, that it was not admissible to prove threats, statements, or particular acts pointing alone to other indictments, and not tending to implicate or explain the conduct of the prisoner in reference to the fire under immediate investigation. *Ibid.*

⁵ *Carroll v. Com.* 84 Penn. St. 107.

⁶ *Dean v. Com.* 4 Grat. 541. *Infra*, § 750.

⁷ See *infra*, § 753.

tion was one of a system of mutually dependent crimes; is it admissible, on a trial for one of these crimes, to put in evidence such other crimes, for the purpose of showing this system? In several lines of civil cases such evidence has been held admissible.¹ Nor is there any reason why such evidence should not be received in criminal cases. In order to prove purpose on the defendant's part, system is relevant, and in order to prove system, isolated crimes are admissible from which system may be inferred. If the evidence is admissible on other grounds, it cannot be excluded because it charges the defendant with an extraneous crime.²

§ 33. Thus while one blow given to A. by B. may be accidental, few counsel would have the audacity to claim accident for eight or ten blows given to A. by B. at successive intervals, under varying conditions.³

§ 34. A party, to take another illustration, is charged with holding or circulating forged paper, or other documents, as to which it is important to prove his *scienter*. One of such papers he may hold without being justly charge-

¹ Whart. on Ev. § 44. See also *infra*, § 753.

² *R. v. Clewes*, 4 C. & P. 221; *R. v. Salisbury*, 5 C. & P. 155; *R. v. Richardson*, 8 Cox C. C. 448; *R. v. Richardson*, 2 F. & F. 343; *R. v. Cobden*, 3 F. & F. 833; *R. v. Rear-don*, 4 F. & F. 76; *R. v. Proud*, L. & C. 97; *State v. Neagle*, 65 Me. 468; *State v. Morton*, 1 Williams, Vt. 310; *State v. Smalley*, 50 Vt. 736; *Com. v. Sturtivant*, 117 Mass. 122; *State v. Ransell*, 41 Conn. 433; *Coleman v. People*, 55 N. Y. 555; *Osborne v. People*, 2 Park. C. R. 583; *Pierson v. People*, 18 Hun, 239; *Brown v. Com.* 76 Penn. St. 319; *Campbell v. Com.* 84 Penn. St. 187; *Duffy v. Com.* S. C. Penn. 1878; *Brown v. State*, 26 Oh. St. 176; *Bainbridge v. State*, 30 Oh. St. 264; *Com. v. Hopkins*, 2 Dana, 419; *Stafford v. State*, 55 Ga. 592; *Pearce v. State*, 40 Ala. 720; *Mason v. State*, 42 Ala. 543; *Gassen-*

heimer v. State, 52 Ala. 325; *State v. Adams*, 20 Kans. 311; *People v. Robles*, 34 Cal. 591; *State v. Cowell*, 12 Nev. 337; *Galbraith v. State*, 41 Tex. 567. For cases of poisoning see *infra*, § 50.

As extending the rule to lottery prosecutions see *Thomas v. People*, 59 Ill. 160; *Miller v. Com.* 13 Bush, 731. The rule is constantly applied in liquor cases. Whart. Crim. Law, 8th ed. § 1520. Thus, evidence that the defendant, the keeper of the Sherman House, kept spirituous liquor for sale there, at a certain date, has a tendency to prove that the defendant, still keeping the Sherman House, kept spirituous liquor for sale there at a later date. *State v. Colston*, 53 N. H. 483.

³ *R. v. Voke*, R. & R. 531; *Landell v. Hotchkiss*, 1 Thomp. & C. (N. Y.) 80.

able with knowledge of its character; when three or four are traced to him, suspicion thickens; if fifteen or twenty are shown to have been in his possession at different times, then the improbability of innocence on his part is in proportion to the improbability that the papers could have been in his possession without his knowing their true character.¹ In such case the inference of system is strengthened by proof that the party had notice, on a prior occasion, that suspicion attached to paper of the same character as that he is now charged with illegally holding or passing.² But a mere confession of having committed other forgeries, not part of the same system, or even proof of being concerned in such independent transactions, is inadmissible.³

§ 35. In prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to,⁴ or, when indicating continuousness of illicit relations, even subsequent to, the act specifically under trial.⁵ Prior sexual attempts on the same woman are admissible, under the same limitations, on a trial of rape.⁶

¹ *R. v. Forster*, Dears. 456; *R. v. Ball*, R. & R. 132; *R. v. Jarvis*, Dears. 552; 7 Cox C. C. 53; *R. v. Fuller*, R. & R. 408; *R. v. Harris*, 7 C. & P. 429; *R. v. Roebuck*, 36 Eng. L. & Eq. 631; *R. v. Pascoe*, Pearce & D. 456; *U. S. v. Burns*, 5 McLean, 23; *State v. McAllister*, 24 Me. 139; *Com. v. Hall*, 4 Allen, 305; *Com. v. Edgerly*, 10 Allen, 184; *State v. Twitty*, 2 Hawks, 248; *Harding v. State*, 54 Ind. 389; *Martin v. Com.* 2 Leigh, 745; *Reed v. State*, 15 Ohio, 207; *State v. Mix*, 15 Mo. 153; *State v. Fisher*, 65 Mo. 437; *People v. Farrell*, 30 Cal. 316; *Speights v. State*, 1 Tex. Ap. 551; *Taylor on Ev.* § 322.

² *R. v. Hough*, R. & R. 120; *R. v. Hodgson*, 1 Lew. 103; *R. v. Forster*, Dears. 456; *R. v. Francis*, L. R. 2 C. C. 128; *State v. McAllister*, 24 Me. 139; *Com. v. Bigelow*, 8 Met. 235; *Com. v. Stearns*, 10 Met. 256; *Finn v. Com.* 5 Rand. 701; *Hendrick v. Com.* 5 Leigh, 708; *Mason v. State*, 42 Ala. 532.

³ *People v. Corbin*, 56 N. Y. 363; *Stalker v. State*, 9 Conn. 341.

⁴ Whart. Crim. Law, 8th ed. § 1733; *State v. Wallace*, 9 N. H. 518; *Com. v. Horton*, 2 Gray, 354; *Com. v. Lahey*, 14 Gray, 91; *Com. v. Thrasher*, 11 Gray, 450; *Com. v. Call*, 21 Pick. 509; *Com. v. Nicholls*, 114 Mass. 285; *Com. v. Bowers*, 121 Mass. 45; *People v. Jenness*, 5 Mich. 305; *Searls v. People*, 13 Ill. 599; *Lovell v. State*, 12 Ind. 18; *Lawson v. State*, 20 Ala. 66; *McLeod v. State*, 35 Ala. 395; *Alsabrook v. State*, 52 Ala. 24; *Richardson v. State*, 34 Tex. 142.

⁵ See fully Whart. Crim. Law, 8th ed. § 1733; *Boddy v. Boddy*, 30 L. J. P. & M. 23; *State v. Wallace*, 9 N. H. 577; *State v. Bridgman*, 49 Vt. 202; *Thayer v. Thayer*, 101 Mass. 111 (overruling *Com. v. Thrasher*, 11 Gray, 450); *State v. Way*, 5 Neb. 283; *Lawson v. State*, 20 Ala. 65; though see *Coventry v. State*, 13 Ala. 172.

⁶ *Infra*, § 46.

§ 36. A defendant, to take another case, sets up *casus* in answer to the charge of firing his house in order to defraud the insurers. To meet this it is admissible for the prosecution to prove that on prior occasions houses occupied by the defendant had been burned, and that he obtained payment for the same from separate insurance companies;¹ and for the same object evidence of an attempt three days before at firing, by the same defendant of the same property, may be received.² In the same line may be mentioned a New York ruling, that evidence of an attempt to set fire to a barn in the same village, and on the same night in which the building in litigation was burned, is admissible on the issue of accident.³

§ 37. When poisoning, also, is set up by the prosecution, it is admissible, as will hereafter be more fully seen, in order to rebut accident, to prove other attempts, by the same defendant, to poison other persons, when such attempts are part of a system with that under trial.⁴

§ 38. When the object is to show system, subsequent as well as prior offences, when tending to establish identity or intent, can be put in evidence. The question is one of induction, and the larger the number of consistent facts, the more complete the induction is. The time of the collateral inculpatory facts is immaterial, provided they be close enough together to indicate that they are part of a system.⁵

§ 39. (3.) Hence, to recur in greater detail to a line of cases noticed in brief in a prior section, if a party is charged with knowingly making, holding, or passing forged paper, and the fact of his possession of the paper is

¹ *R. v. Gray*, 4 F. & F. 1102; *Com. v. McCarty*, 119 Mass. 354.

In *Kramer v. Com.* 87 Penn. St. 299, which was a trial for arson, an attempt by the defendant to burn the same property two days subsequent to the act charged was admitted. See *infra*, § 53.

² *Com. v. Bradford*, 126 Mass. 42. As to inference of other firings by steam-engine see *Whart. on Ev.* § 42

³ *Faucett v. Nichols*, 64 N. Y. 377; S. C., 4 N. Y. Sup. Ct. 597.

⁴ *Infra*, § 52.

⁵ *R. v. Reardon*, 4 F. & F. 76; *State v. Bridgman*, 49 Vt. 202; *Com. v. Price*, 10 Gray, 472; *Thayer v. Thayer*, 101 Mass. 111; *Kramer v. Com.* 87 Penn. St. 299. See *infra*, § 45. For cases of subsequent libels see *infra*, § 52, and of subsequent utterings of forged money, *infra*, § 45.

shown, but his knowledge of its character is disputed, it is admissible to show that shortly before or shortly after the event charged he had held or uttered similar forged instruments to an extent which makes it improbable that he should have been ignorant of the forgery.¹ Thus in a leading English case, on an indictment for uttering a bank of England note, knowing it to be forged, evidence was offered for the prosecution that the defendant had uttered another note forged in the same manner, by the same hand, and with the same materials, three months previously, and that two ten pound notes and thirteen one pound notes of the same fabrication had been found on the files of the company, on the back of which there was the defendant's handwriting, but it did not appear when the company received them. This evidence was admitted, and "the case was referred to the opinion of the judges, the majority of whom were of opinion that it was admissible, subject to observation as to the weight of it, which would be more or less considerable according to the number of the notes, the distance of the time at which they had been put off, and the situation of life of the defendant, so as to make it more or less probable that so many notes could pass through his hands in the course of business."² It is not necessary in such cases that the other forged money should be of the same denomination as that under trial.³

knowledge
is to be
shown.
Counter-
feiting.

§ 40. It was at one time thought that where the second uttering has been made the subject of a distinct indictment, evidence of such uttering might, in the discretion of the judge, be refused.⁴ The better opinion now is that the

That in-
dictments
have been
found for
illustrative

¹ R. v. Hough, R. & R. 120; R. v. Ball, R. & R. 132; R. v. Hodgson, 1

State, 3 Ind. 353; Steele v. People, 45 Ill. 152.

Lew. 102; R. v. Balls, 1 Mood. C. C.

² R. v. Ball, R. & R. 132, 1 Camp. 324, cited in Roscoe's Cr. Ev. 93.

470; U. S. v. Craig, 4 Wash. C. C.

³ R. v. Harris, 7 C. & P. 429; R.

729; U. S. v. Doebler, 1 Bald. 519;

v. Oddy, 2 Den. C. C. 264; 5 Cox C.

State v. McAlister, 24 Me. 139; Com.

C. 210; R. v. Foster, 24 L. J. M. C.

v. Stearns, 10 Met. 256; Com. v.

134; 29 Eng. L. & Eq. 548. See

Hall, 4 Allen, 305; Com. v. Edgerly,

State v. Smith, 5 Day, 175; Stalker

10 Allen, 184; Spencer v. Com. 2

v. State, 9 Conn. 341; Reed v. State,

Leigh, 751; Martin v. Com. 2 Leigh,

15 Ohio, 217.

745; Hendricks v. Com. 5 Leigh, 708;

Wash v. Com. 16 Grat. 530; Mason

⁴ R. v. Smith, 2 C. & P. 633; Tal-

v. State, 42 Ala. 532; McCartney v.

fourd's Dickin. Sess. 359.

offences makes no difference. fact of another indictment having been found does not alter the rule.¹ And it has been declared in England to be impracticable to lay down any general test as to the time within which such previous uttering must have taken place, in order to be admissible.²

Accomplices' utterings may be in like manner proved.

§ 41. Utterings by the defendant's accomplices are as admissible as utterings by himself, accompliceship being first shown.³

But illustrative offence must be duly proved.

§ 42. The instrument alleged to form the basis of the independent offence must be produced, or accounted for by showing the defendant took it back or destroyed it.⁴ Unless proved in the same way as is the instrument which the defendant is charged with forging or uttering, it cannot be received.

§ 43. A similar inference is to be drawn from the possession of masses of counterfeit money, and of the implements of counterfeiting. Such facts may be put in evidence when tending to show a part of a system with the act principally charged.⁵ Nor is the evidence in such cases limited to proof of the collateral crime. The defendant's conduct at the time is admissible in order to prove guilty knowledge.⁶

Similar inferences as to masses of counterfeits, &c.

§ 44. Guilty knowledge being the gist of the offence of receiving stolen goods, receptions about the same time of other goods of a similar character stolen from the same person, or persons connected with him, may be put in evidence on the trial of an alleged receiver.⁷ But the other occasions on which the stolen property was received must not be

¹ R. v. Hodgson, Lew. C. C. 102; R. v. Kirkwood, Lew. C. C. 103; R. v. Forster, 29 Eng. L. & Eq. 548; Dears. C. C. 456; 6 Cox C. C. 521; People v. Curling, 1 Johns. 320; Hoskins v. State, 11 Ga. 92.

² R. v. Salt, 3 F. & F. 834. *Supra*, § 38.

³ *Infra*, §§ 698 *et seq.*

⁴ R. v. Millard, R. & R. 245; R. v. Forbes, 7 C. & P. 224; R. v. Phillips, 1 Lew. C. C. 105; Com. v. Bigelow, 8 Met. 235; Martin v. Com. 2 Leigh, 745.

⁵ R. v. Fuller, R. & R. 408; U. S. v. Hinman, 1 Bald. 292; U. S. v. Burns, 5 McLean, 23; People v. Thomas, 3 Parker C. R. 256; State v. Twitty, 2 Hawks, 248; People v. Farrell, 30 Cal. 316; People v. Page, 1 Idaho, 114.

⁶ R. v. Tattershall, 2 Leach, 984.

⁷ See R. v. Oddy, 2 Den. C. C. 264; 5 Cox C. C. 210; People v. Rando, 3 Parker C. R. 335; Yarborough v. State, 41 Ala. 405; Shriedly v. People, 23 Oh. St. 30; Devoto v. Com. 3 Metc. (Ky.) 417.

so far removed in point of time as to form entirely different transactions.¹ And the principal act, in order to admit the illustrative acts, must be antecedently proved.²

§ 45. It was at one time doubted whether a guilty receiving or uttering, subsequent to that charged in the indictment, was admissible in evidence.³ It is, however, now Subsequent utterings ad-

¹ *R. v. Dunn*, 1 Mood. C. C. 150; *R. v. Oddy*, *ut supra*; *Com. v. Hills*, 10 Cush. 580; *Coleman v. People*, 58 N. Y. 180; *Copperman v. People*, 56 N. Y. 591.

In *R. v. Nicholls*, 1 F. & F. 51, the prisoner was indicted for receiving a quantity of lead knowing it to have been stolen. Cockburn, C. J., allowed evidence to be given that on several occasions, between the early part of January and the 11th of February, the prisoner, in company with another person, had sold lead stolen from the same place and taken a share of the money.

² *Infra*, § 48; *R. v. Oddy*, *ut supra*.

"The positive side of the rule," says Sir J. Stephen (in *Criminal Law*, p. 309), "is of less importance than the negative side; but it is not easy to state precisely on what principle the line between what may and what may not be given in evidence has been drawn. The strongest case of admitting other transactions to show the character of the particular one under inquiry are the cases of the subsequent poisonings and precedent uttering of bad money.

"The strongest case of excluding other transactions is the case of receiving stolen goods. Where a man is tried for this crime, it is not lawful to give in evidence the fact that the prisoner had knowingly received stolen goods on former occasions, to show that he knew that the particular goods are stolen. *R. v. Oddy*, 2 Den. 264. How this differs from the case of uttering it is hard to understand. Per-

haps the difference may be that in the case of the coin there are specific physical differences of color, weight, &c.; whereas there are no outward signs by which stolen goods can be distinguished from any others. To prove that a man understood the meaning of French words on a given occasion you might prove that he knew French; but you could not prove that he knew German, Spanish, and Italian, and was therefore likely as a linguist to know French also. This may justify the decision. The cause, probably, was the practical reflection that, in cases of uttering, there is often no other evidence of guilty knowledge to be had than evidence of other utterings; whereas, in cases of receiving, there are generally circumstances of suspicion attaching to each transaction."

In England, by act of parliament, upon the trial of a person for receiving, evidence may be given of other property, stolen within the previous year, having been found in his possession at the same time as the property the subject matter of the indictment, and evidence of his previous conviction within the preceding five years for any offence involving fraud or dishonesty may also be given. Stephen's *Ev.* part i. c. 3.

It is no objection to the proving of such receptions that they have been prosecuted in distinct indictments. *R. v. Davis*, 6 C. & P. 177. *Supra*, § 40.

³ *R. v. Taverner*, 4 C. & P. 413; *R. v. Smith*, 4 C. & P. 411; *R. v. Oddy*, *supra*.

missible to prove guilty knowledge. settled in Massachusetts that on an indictment for having a counterfeit note in his possession with intent to pass it, evidence that the defendant subsequently had in his possession other and different counterfeit bank bills is admissible.¹ And in a recent English case,² the Court of Criminal Appeal held, that on an indictment for uttering a counterfeit crown piece knowing it to be counterfeit, proof that the prisoner, on a day subsequent to the day of such uttering, uttered a counterfeit shilling, was admissible to prove the guilty knowledge of the prisoner. "The uttering of a piece of bad silver," said the court, "although of a different denomination from that alleged in the indictment, is so connected with the offence charged that the evidence of it was receivable."³

§ 46. (4.) In connection with the last exception are to be noticed cases in which, a party's intention being in issue, acts of a similar character are admissible.⁴ The defendant's manner at the time of passing counterfeit money may also be proved for the same purpose.⁵ For the same reason, evidence of prior sexual assaults on the prosecutrix are admissible on an indictment for rape,⁶ though not of

¹ *Com. v. Price*, 10 Gray, 472.

² *R. v. Foster*, 24 L. J. M. C. 134; 29 Eng. Law & Eq. 548; *Dears. C. C.* 456; 6 Cox C. C. 521.

³ See also *R. v. Robinson*, 2 Leach, 749. That to show system subsequent offences may be proved has been already mentioned. *Supra*, § 38.

⁴ *R. v. Millard*, R. & R. 245; *R. v. Wylie*, 1 B. & P. N. R. 93; *R. v. Ball*, R. & R. 132; *R. v. Dossett*, 2 Cox C. C. 243; 2 C. & K. 306; *R. v. Weeks*, 1 L. & C. 18; *Bottomly v. U. S.* 1 Story, 135; *State v. Watkins*, 9 Conn. 47; *State v. Wentworth*, 37 N. H. 196; *Com. v. Tuckerman*, 10 Gray, 173; *Com. v. Bradford*, 126 Mass. 46; *People v. Hopson*, 1 Denio, 574; *People v. Stout*, 4 Parker C. R. 71, 132; *Cole v. Com.* 5 Grat. 696; *State v. Raymond*, 28 Iowa, 582; *State v. Rash*, 12 Ired. 382; *Johnson v. State*,

17 Ala. 618; *Butler v. State*, 22 Ala. 43; *State v. Larkin*, 11 Nev. 314.

⁵ *Butler v. State*, 22 Ala. 43; *Bayley on Bills*, 449; *Archbold's C. P.* 9th ed. 103. *Infra*, § 751.

So on a charge of sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be shown in evidence, as explanatory of the meaning and intent of the particular letter on which the prosecution is based. *R. v. Robinson*, 2 Leach, 749. *Infra*, § 756.

Guilty knowledge and intent, also, in prosecutions for the sale of intoxicating liquor, may be proved by former convictions for the same offence. *State v. Neagle*, 65 Me. 468. *Supra*, § 39.

⁶ *State v. Walters*, 45 Iowa, 389; and cases cited *infra*, § 49.

rapes on other persons.¹ On the trial, also, of an indictment for murder, committed when attempting a rape, proof of prior sexual attacks on the deceased is admissible.²

¹ Ibid.; *State v. Lapage*, 57 N. H. 245.

² *State v. Lapage*, 57 N. H. 245; *Turner v. Com.* 86 Penn. St. 54. *Supra*, § 35.

On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money, — the prisoner being a soldier, and the accusation having been made while he was on duty as a sentry, — evidence of declarations made by him on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house and accuse him of an unnatural crime, is admissible. *R. v. Cooper*, 3 Cox C. C. 547. *Infra*, § 52.

The cases are thus grouped in the 8th edition of Roscoe's *Crim. Ev.* 99 :

"In *R. v. Roebuck*, 25 L. J. M. C. 51; S. C., Dears. & B. C. C., the prisoner was indicted for obtaining money from a pawnbroker by falsely pretending that a chain was silver. The chain was of a very inferior metal, and evidence was admitted, apparently without objection, that twenty-six chains were found on the prisoner, and that these were of similar materials. Evidence was also admitted that the defendant, a few days after the occasion in question, offered a similar chain to another pawnbroker, under similar circumstances. This was objected to, and the point, with other points, reserved. There is no trace of any discussion on this point, or any allusion to it in the judgment of the court in any of the reports; but the conviction was affirmed. The prisoner did not appear by counsel. In *R. v. Holt*, 9 W. R. 74, the prisoner was tried for obtaining, by false pretences, a sum of money from one Hirst.

It appeared that the prisoner was employed by his master to take orders for goods, but was forbidden to receive money. On the 30th of April, the prisoner obtained from Hirst the sum of nine shillings and sixpence in payment for goods bought by Hirst of the prisoner's master, and which sum the prisoner falsely represented that he had authority to receive; this was the offence charged in the indictment. Evidence was also tendered that within a week after the 30th of April the defendant obtained from another customer of his master the sum of eleven shillings by a similar false representation. The evidence was objected to, but received on the ground that it showed the intent of the prisoner when he committed the act charged in the indictment, and the question was reserved for the consideration of the Court of Criminal Appeal. No counsel appeared on either side, and no reasons are given for the judgment; but the conviction was quashed, Erle, J., merely saying that, upon the facts stated in the indictment, the court thought the evidence objected to inadmissible.

"Perhaps the ground upon which this decision proceeded was this: that the only shape in which the evidence was admissible, if at all, was for the purpose of showing that the prisoner knew he did not possess the authority which he represented himself to have; and it may have been thought that for this purpose the evidence was not relevant, because, if any *bonâ fide* mistake existed upon this point, it would operate in one case as well as another, so that a mere repetition of the act would not, as in many other cases,

It is essential, however, that such evidence, if admitted, should be simply to prove intent, and not to prove character, or establish a substantive and independent crime. Thus in 1861, in Massachusetts, a new trial was granted in a case of embezzlement, where evidence of distinct acts of fraud was admitted, but where it did not appear that such evidence was limited by the judge, in his instructions to the jury, to the question of intent.¹

add anything to the evidence of guilt; though it might seem that this is rather an objection to the weight of the evidence than to its admissibility. In *R. v. Richardson*, 2 F. & F. 343, the prisoner was indicted for embezzlement; three acts of embezzlement were charged in the indictment. It appeared that the prisoner's duty was to make various payments on account of his employers, and to keep weekly accounts of the money so expended. The sums so expended were correctly entered, but in casting up the items at the end of each week the totals were made to exceed the real amount by sums varying from £1 to £3. The prisoner, in accounting with his master, took credit for the larger sums. For the prosecution, in order to show that this was not the result of innocent mistake on the part of the prisoner, evidence was tendered that in numerous weeks, both before and after that charged in the indictment, similar mistakes, always in favor of the prisoner, had been made. This evidence was objected to, but Williams, J., ruled that it was admissible to counteract an obvious defence on the part of the prisoner, and he said that Pollock, C. B., entirely agreed with him on the point. So also where the prisoner had to account weekly, and in the indictment he was charged with embezzling the gross weekly amounts, evidence was admitted of the separate items making up the gross amounts, partly on the ground that the fact of having

omitted to account for the separate items would go to show that the not accounting was not mere accident. *R. v. Balls*, L. R. 1 C. C. 328; 40 L. J. M. C. 148."

Where a defendant was on trial for breaking and entering the City Hall, at Charlestown, and a mass of burglarious tools and implements, found in his possession at the time of his arrest, were exhibited to the jury, some of which were adapted to the commission of the offence with which he was charged, it was held that it was not competent for the government to prove that the notch of a key found among such tools and implements was made and fitted by the defendant, for the purpose of opening the door of the building of the Lancaster Bank. *Com. v. Wilson*, 2 Cush. 590. On the other hand, it has been ruled that where the prisoner was seen on the day after the burglary for which he was indicted, under very suspicious circumstances, near the place where it was committed, it was competent to prove that the implements used came from his home. *People v. Larned*, 3 Selden, 445. For proof of guilty knowledge in cases of firing see *supra*, § 36.

¹ *Com. v. Shepard*, 1 Allen, 575. See *R. v. Ball*, R. & R. 132; *Com. v. Vaughan*, 9 Cush. 594.

A. was tried for maliciously burning a barn of B., and there was evidence implicating C. in the offence. To show malice on the part of C. toward B., the prosecution proved that he

§ 47. (5.) Proof of a collateral offence may be relevant in order to identify the defendant, or certain articles connected with the offence.¹ Thus, on an indictment for arson, evidence has been admitted to show that property which had been taken out of the house at the time of the fire was afterwards discovered in the prisoner's possession.² And so on an indictment for stabbing, in order to identify the instrument, evidence may be adduced of the shape of a wound given to another person by the prisoner at the same time, although such wound be the subject of another indictment.³ When an *alibi* is disputed, it is therefore admissible to prove that at the

Exception
in ques-
tions of
identity.

had, before the fire, commenced a criminal prosecution against B., in which the latter was discharged. It was held that A. could not show, in order to disprove malice, that such prosecution was founded on probable cause. *Com. v. Vaughan*, 9 Cush. 594. But ordinarily a defendant may prove that the facts relied on to show guilty intent do not bear such construction. *State v. Morton*, 8 Wis. 352. See Phillips on Ev. 470.

¹ *R. v. Rooney*, 7 C. & P. 517; and see *R. v. Briggs*, 2 M. & R. 199; *Yarborough v. State*, 41 Ala. 405; *Satterthwaite v. State*, 6 Tex. Ap. 609.

The true distinction in this respect is well illustrated in a case before the Supreme Court at Albany, in September, 1868. *Hall v. People*, 6 Parker C. R. 671. The defendant was charged with burglariously opening the barn of J. G., and stealing certain articles, which were subsequently found on the defendant's boat, and in his possession. It was held to be erroneous to permit the prosecutor to prove that there was also found on the prisoner's boat other articles of property stolen from a third party, two or three weeks prior to the alleged burglary. "This testimony," said Peckham, J., "is loose and indirect — inconclusive and dangerous. The People might have

properly shown the condition of things where this property was found, but they could not prove another felony, unless it was so strongly connected with the felony charged as to prove, or strongly tend to prove, that the man who committed the one was guilty of the other. I remember a case of one Dunbar, tried for the murder of a boy in Albany County. It appeared that two little boys had been murdered the same afternoon and on the same farm — were left together about midday, and were killed that afternoon. One was found, within a few days, hanging in a tree; the other some distance off, on the same farm, killed by a flail and partly buried. There was other evidence tending strongly to show that the same person must have killed both. On the trial for killing the one found buried, evidence was offered and received that the nails in the prisoner's boots fitted precisely the marks made in climbing the tree where the other boy was found suspended. That testimony, I think, was clearly proper."

² *R. v. Rickman*, 2 East P. C. 1035.

³ Per Gaselee, J., and Park, J., *R. v. Fursey*, 6 C. & P. 81; *Roscoe's Crim. Ev.* 92, giving the above citations.

time at issue the defendant was present perpetrating independent crimes.¹

§ 48. To sustain the exceptions heretofore enumerated, however, and to make evidence of independent crimes admissible, the following conditions must exist: —

Conditions
of such ex-
ceptions.

(a.) Ground must first be laid implicating the defendant in the case under trial; and unless sufficient evidence of this has in the opinion of the judge been received, all evidence of other offences to prove intent must be excluded. For it is a violation of the fundamental sanctions of our law to admit evidence that the defendant committed one offence in order to prove he committed another.

(b.) The extraneous crime cannot be put in evidence without proof that the defendant was concerned in its commission.²

(c.) There must be system established between the offence on trial and that introduced to connect it with the defendant.³

§ 49. What has been said of crimes is applicable to attempts. They may be put in evidence, when relevant, under the same restrictions as have heretofore been stated with regard to crimes.⁴ On an indictment for rape, therefore, prior attempts to ravish may be put in evi-

Proof of
prior at-
tempts in
like man-
ner admis-
sible.

¹ Stephen's Ev. 10; *R. v. Bleasdale*, 2 C. & K. 265; and see *Turner v. Com.* 86 Penn. St. 54.

² *R. v. Harris*, 4 F. & F. 342.

A letter to the defendant, enclosing counterfeit money, which letter has been taken from the post-office by the defendant, but not opened by him, or its genuineness acknowledged by him, is not evidence against him. *Com. v. Edgerly*, 10 Allen, 184. *Infra*, § 682. So forged paper found on the wife's person cannot be used against the husband without proving his knowledge. *People v. Thoms*, 3 Parker C. R. 256.

³ In *People v. Spielman*, N. Y. Ct. of App. 1879, which was an indictment for procuring goods by false pretences in January, 1876, evidence of similar representations to others in March, 1876, was offered to prove

falsity, and was excluded for that purpose, but was admitted to show the knowledge of falsity in January. This was held error. See other cases *infra*, § 53.

⁴ See *infra*, § 753; *R. v. Voke*, R. & R. 531; *Mimms v. State*, 16 Oh. St. 221; *Templeton v. People*, 27 Mich. 501; *State v. Waters*, 45 Iowa, 389; *Defrese v. State*, 3 Heisk. 53. See *Snyder v. State*, 59 Ind. 105.

On an indictment against persons for a conspiracy to carry on the business of common cheats, evidence is admissible of the defendant's having made false representations to other tradesmen besides those named in the indictment. *R. v. Roberts*, 1 Camp. 400.

In another case, upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection

dence, when intention is at issue.¹ But such collateral attempts must be shown to be connected with the crime on trial.²

§ 50. On a trial for poisoning, is it admissible to prove prior poisonings perpetrated by the same defendant? ³ On the first glance, the answer would be emphatically in the negative, unless such poisonings were first shown to be part of a system with that under trial, or wrought up in the *res gestae*. It is grossly unjust to the defendant to try him for one crime when charging him with another. It is destructive of fairness and regularity of procedure to try more than one issue at a time. Hence to prove a particular poisoning it is inadmissible to put in evidence another independent poisoning.⁴ And

and discontent among his majesty's subjects at Manchester, it was held that the previous conduct of a portion of the assembly, in training, &c., and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it as to each particular defendant was a distinct matter for the consideration of the jury. It was held competent to show, also, as against Hunt (who, though a stranger, except by political connection, had been invited to preside as chairman at the meeting), that at a similar meeting in another place, held for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declaration of his sentiments and views on the particular subject of such meetings, and of the topics there discussed. *R. v. Hunt*, 3 B. & Ald. 566.

¹ *State v. Knapp*, 45 N. H. 148; *Strang v. People*, 24 Mich. 1; *State v. Waters*, 45 Iowa, 389; *Williams v. State*, 8 Humph. 583; and cases cited *supra*, §§ 35, 38.

² *State v. Freeman*, 4 Jones (N. C.), 5. *Infra*, § 753.

³ For presumptions in cases of poisoning see *infra*, §§ 787 *et seq.*

⁴ To this effect was the ruling of the Superior Court sitting at New Haven, Conn., in April, 1872, on the trial of Mrs. Lydia Sherman, charged with the murder of her husband, Horatio N. Sherman. The prosecution proposed at the outset to prove that Horatio N. Sherman died on the 12th of May, 1871, from arsenical poisoning, and then they proposed to put on the stand a witness to show that on the 25th of December, 1870, Ada Sherman, a girl some fifteen years of age, a daughter of the deceased, was taken with symptoms identical with those with which Horatio N. Sherman died; that she lingered till the 31st day of December, and died; that they should offer to show that the symptoms were those of arsenical poison; they would further offer to show that a chemical analysis of the intestines and stomach was made and arsenic found, and that it caused the death of Ada Sherman; they would offer in proof that on the 16th day of November, 1870, a little more than a month before the death of Ada Sherman, Frank Sherman, a boy some eleven or thirteen months of age, died with symptoms of arsenical poisoning, and that a chemical analysis made disclosed the presence of arsenic; in con-

it is now settled that to permit several independent poisonings to be introduced by the prosecution in a bunch at the outset,

nection with that testimony they would show that the prisoner was present in the family of Horatio N. Sherman at the time of both of these deaths, and had the sole care of Ada Sherman, substantially the whole care of her, and had part care of the infant, Frank Sherman, and that she was to have had the whole care within one week's time of his death, and that if he had lived she would have had the sole care of the child; also that she had charge of the food with which the child was fed, and prepared a part of it; they should offer further to show that on the 20th of January, 1870, Dennis Hurlbut, the then husband of the prisoner, died after a sickness of four or five days, with symptoms during that sickness that were strongly marked with arsenical poisoning; that an analysis of his stomach and parts of his body disclosed the marked presence of arsenic there in such a quantity as must have caused death; that he was under the sole control of the prisoner; that she took care of him; that he received everything from her hands; that she was the only person present, and was where she could administer to these four persons that died of arsenical poisoning, was the only living person in the family of Hurlbut, that was in the family of Sherman at the time of these successive deaths.

The evidence was rejected by the court, Judge Sanford saying: "My own very strong conviction is, after the careful arguments which have been made in favor of and against the introduction of the testimony, and such an examination of the authorities as I have deemed necessary to make, that this testimony, such as is now proposed to be offered, is not admissible for the

purpose for which it is here claimed. I suppose no principle is better established than this, that you cannot introduce evidence of a crime committed by the party accused for the purpose of showing that she was guilty of a crime which was another and distinct crime. It is true, as is claimed here, that it is strong proof, strong moral evidence, but that is not the sort of evidence upon which we are to try the party accused of crime, but it is to be upon legal evidence, while it would be perhaps strong moral evidence. I refer to this evidence without speaking of it more particularly, for it is hardly worth while to make anything more than a distinct allusion to it. I say that there is no principle of law, so far as we could discover, that permits the introduction of this kind of testimony. It is claimed that it is offered for the purpose, first, of showing the criminal intent, but it is obvious that the evidence is not important for that purpose. It is said the evidence is material to show that the party accused had within her control the means by which this crime was accomplished. It seems to me that it does not even tend to show that circumstance. The fact that she had within her control a year ago, or five years ago, the means by which she could commit a crime yesterday, does not tend to show that she had it yesterday within her control. It is claimed to show that she had a knowledge of the properties of the article which was used. I think, as was well said, that it is not necessary for the State to show that the accused had the knowledge of so well known an article as this poison. It seems to me that it all comes to this: it is for the purpose, and the real object is to show not this

when only one poisoning is charged in the indictment, is inadmissible, for the reason that this would create several distinct issues, and would subject the defendant to the hardship of being tried, as to all of these issues but one, without any prior notice by which he could prepare for his defence. But suppose that the defendant, conceding the fact that the deceased was poisoned, sets up as a defence that the poisoning was accidental. Would it then be competent for the prosecution to prove in rebuttal that several prior poisonings had taken place in the same household within a short time previous? When we recollect that the rule, in regard to passing forged money, has always been to meet the defence of accident by just this sort of evidence, it would be hard to answer the question in the negative. This does not mean that because A. poisoned somebody ten years ago,

particular circumstance for which it is claimed, but for the purpose of showing that a prisoner who was wicked enough to commit such a crime would be wicked enough to do this one; and therefore the jury are to infer that, because she may have committed a crime of a like nature, therefore she has committed this. It is contrary to all the known principles of law to admit such testimony, and therefore I am of the opinion, in view of the strong weight of authorities the other way, that we ought not to admit this testimony, at least in this stage of the case. As the case stands at present, it seems to me the testimony is not admissible."

The same result, on an issue of a similar nature, was reached by the Supreme Court of Pennsylvania in 1872. "To make," said Judge Agnew, in giving the opinion of the court, "one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection

which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner, to compel him to acquit himself of two offences instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offences charged against him, and of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious, that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." *Shaffner v. Com.* 72 Penn. St. 60. See also *People v. Doyle*, 21 Mich. 221; *Farrer v. State*, 2 Oh. St. 64.

somebody else, who died yesterday under suspicious circumstances, was poisoned by A. If such reasoning were correct, it would be easy enough to find a scapegoat on whom all new poisonings could be avenged, since all that would be necessary for this purpose would be to pick out as a defendant some one who had committed some poisoning in former years. What is meant is, that when a defendant says, "I did not know that this drug was poison; or, knowing it, I administered it by mistake," then it is admissible to answer, "There are so many other cases in which you administered the same drug with fatal effect, that we must infer that your defence of accident in this case cannot be sustained." The reasoning is somewhat the same as that which leads us to regard a physician as guilty of malpractice, on facts which would not be regarded as imputing guilt to a lay attendant. We say, "You must have known better." And to this is added the conclusion from probabilities already noticed. We say that it is hard to believe, where there is a series of similar acts each tending to the same object, that these acts were undesigned. The acts mutually illustrate each other's motives, and the more numerous the acts the more clearly is motive proved. Poison may have been communicated to B. by accident, and the evidence as to this may be in equipoise. But when to C., within the same range of objects as B., the same kind of poison at another time is administered, then it may be two to one that the act was designed. And in proportion to the number of persons belonging to a particular class who are poisoned does the defence of accident, set up by the perpetrator of these several acts, vanish. Hence, to meet the defence, evidence of such other poisons may be received.¹ So, indeed, has it been twice held in England. Thus Maule, J., when ignorance of the poisonous character of a "white powder" was set up as a defence, admitted evidence of the prior administering, by the defendant, of the same powder to another person, who died.² And in a much later case, upon the trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident, evidence was admitted that the male prisoner's first wife

¹ See *Crim. Law Mag.* (1880), 29.

² *R. v. Dossett*, 2 C. & K. 306.

had been poisoned nine months previously ; that the woman who waited upon her, and occasionally tasted her food, showed symptoms of having taken poison ; that the food was always prepared by the female prisoner ; and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison.¹ So in 1873, where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the charge under trial from the same poison, was held to be admissible by Archibald, J., after conferring with Pollock, B.²

§ 51. On the trial of a husband for the murder of his wife, the State has a right to prove a long course of ill treatment by the husband of the wife,³ and his adultery with another.⁴

Distinctive
rules in
cases of
marital
homicide.

¹ *R. v. Garner*, 4 F. & F. 346. Sir J. Stephen (Criminal Law, p. 308), in discussing this point, says: "Four indictments against a woman for poisoning her husband and two of her sons by arsenic, and for administering arsenic with intent to murder another son, being presented at one assize, evidence as to the administration of the arsenic to the three sons was tendered on the trial for poisoning the husband, though the sons were poisoned some months after the husband's death. It was admitted, on the double ground that the similarity of the symptoms proved that the husband died of arsenic, and that the recurrence of the same event proved that it was not accidental. *R. v. Geering*, 18 L. J. M. C. 215. The case of *R. v. Gardner*, at Lincoln Lent Assizes, was very similar to this." *S. P., R. v. Heeson*, 14 Cox C. C. 40.

² *R. v. Cotton*, 12 Cox C. C. 400.

³ *Infra*, § 785 ; *State v. Watkins*, 9 Conn. 47 ; *Sayres v. Com.* 88 Penn. St. 291 ; *State v. Langford*, Busbee, 436 ; *Stone v. State*, 4 Humph. 27 ;

Cole v. Com. 2 Grat. 696 ; *State v. Wisdom*, 8 Porter, 511 ; *Johnson v. State*, 17 Ala. 618. *Infra*, §§ 784, 785, 786. See *Turner v. Com.* 86 Penn. St. 54.

⁴ *Stout v. People*, 4 Parker C. R. 132 ; *State v. Rash*, 12 Ired. 382. See *infra*, §§ 785, 786, for cases ; and see *People v. Jenness*, 5 Mich. 323 ; *Templeton v. People*, 27 Mich. 501 ; *St. Louis v. State*, 8 Neb. 81.

On the trial in Massachusetts of a man for the alleged murder of a woman, the judge submitted to the consideration of the jury all the evidence of the relations and intercourse between the prisoner and the deceased for six months before the homicide ; refused to rule, as requested by the defendant, that there was no evidence of any engagement of marriage between them ; and ruled that the jury should consider all the facts as showing the relations and explaining the conduct of the parties. It was ruled that the defendant had no ground of exception. *Com. v. Costley*, 118 Mass. 1.

§ 52. The hypothesis of the prosecution in libel being that the libel was malicious, to prove malice it is relevant for
 In libel. the prosecution to put in evidence continuous prior defamation by the defendant,¹ and for this purpose acts of defamation subsequent to that in issue are admissible.² No subsequent libels, however, can be admitted, if they do not relate to the same general subject matter as in that charged;³ though repetitions, even after action brought, are admissible.⁴ Insulting acts, preceding or accompanying a defamatory publication, can also be put in evidence as showing its motive.⁵ On the other hand, in civil suits, in mitigation of damages, the defendant has been allowed to prove that he copied the libel from another newspaper,⁶ or that he had been provoked by attacks on him by the plaintiff,⁷ provided such libels relate to the general subject of the trial,⁸ or are generally calculated to provoke.⁹

§ 53. Fraud being in dispute, it is admissible to prove any
 In fraud. facts from which its existence or non-existence may be logically inferred.¹⁰ Nor is the prosecution confined to

¹ *Barrett v. Long*, 3 H. L. Cas. 395, 414. See *R. v. Robinson*, 2 Leach, 749; *R. v. Boucher*, 4 C. & P. 562; *R. v. Cooper*, 8 Cox C. C. 547; *Com. v. Snelling*, 15 Pick. 337; *State v. Riggs*, 39 Conn. 498; *State v. Lehre*, 2 Brev. 446; *State v. Allen*, 1 McCord, 525. See Whart. Crim. Law, 8th ed. § 1651.

² *Supra*, § 38; *Pearson v. Le Maitre*, 6 Scott N. R. 607; 5 M. & Gr. 700. See also *Hemmings v. Gasson*, E., B. & E. 346; *Perkins v. Vaughan*, 4 M. & Gr. 988.

³ See *Finnerty v. Tipper*, 2 Camp. 72; *Watson v. Moore*, 2 Cush. 133; *Townsend on Libel*, § 390; though see *U. S. v. Crandall*, 4 Cranch C. C. 683.

⁴ *Townsend on Libel*, § 390. See, as to general rule, *Baldwin v. Soule*, 6 Gray, 321; *Robbins v. Fletcher*, 101 Mass. 115; *Mix v. Woodward*, 12 Conn. 262; *Williams v. Miner*, 18 Conn. 464; *Howard v. Sexton*, 4 N.

Y. 157; *Kennedy v. Gifford*, 19 Wend. 296.

⁵ *Bond v. Douglas*, 7 C. & P. 626; *Kean v. McLaughlin*, 2 S. & R. 469. See *C. v. A. B.*, 2 Weekly Notes, 291.

⁶ *Saunders v. Mills*, 6 Bing. 213; affirmed in *Pearson v. Le Maitre*, 6 Scott N. R. 607; 5 M. & Gr. 700.

⁷ *Taylor's Ev.* § 322, citing *Watts v. Frazer*, 7 A. & E. 223; *Tarpley v. Blabey*, 2 Bing. N. C. 437; 4 Scott, 642; *May v. Brown*, 3 B. & C. 113; *Hotchkiss v. Lothrop*, 1 Johns. 286.

⁸ *May v. Brown*, *ut supra*.

⁹ See *Wakley v. Johnson*, Ry. & M. 422; *Thomas v. Dunaway*, 30 Ill. 373; *Botelar v. Bell*, 1 Md. 173; *Pugh v. McCarty*, 40 Ga. 444.

¹⁰ *R. v. Murdock*, 2 Den. C. C. 298; *R. v. Wortley*, 2 Den. C. C. 334; *R. v. Batts*, 8 Cox C. C. 140; *Blake v. Albion Co.* 14 Cox C. C. 246; *Com. v. Jeffries*, 7 Allen, 548; *Stockwell v. Silloway*, 113 Mass. 384; *Cook v.*

the fraudulent misstatements which are the immediate subjects of suit; other illustrative fraudulent misstatements may be put in evidence,¹ though to make such misstatements admissible they must be part of a system with the offence charged.² Thus, upon a trial for false pretences it is competent, in order to prove intent, to show that the accused made similar representations about the same time to other persons, and by means of such false representations obtained goods.³ On a trial for false pretences by means of a spurious ring, other similar spurious offerings may be put in evidence.⁴ In conformity with the rule just stated, on a

Moore, 11 Cush. 216; *Com. v. Butterick*, 100 Mass. 1, 12; *Calkins v. State*, 18 Oh. St. 366; *People v. Marion*, 29 Mich. 31; and cases cited *supra*, § 46.

¹ "Fraud being alleged, a wide range is given in proof of circumstances tending to establish it, it being a matter of secrecy generally. It is only by collecting together numerous circumstances oftentimes that it can be brought to the light and exposed." *Hall v. Stanton*, Sup. Ct. Penn. 2 Weekly Notes, 578; *Brown v. Shock*, 77 Penn. St. 471. See also *Hall v. Naylor*, 18 N. Y. 588; *Castle v. Bullard*, 23 How. 172. Compare *R. v. Holt*, Bell C. C. 280; *Hovey v. Grant*, 52 N. H. 569.

As to the latitude allowed in cases of fraud see *Simons v. Vulcan Co.* 61 Penn. St. 202; *Heath v. Page*, 63 Penn. St. 108; *Woods v. Gummert*, 67 Penn. St. 136; *Brown v. Shock*, 77 Penn. St. 471.

² See *supra*, §§ 29 *et seq.*; *Bottomley v. U. S.* 1 Story, 135.

³ *Trodden v. Com.* 7 Rep. 411; 31 Grat. See *State v. Call*, 48 N. H. 126; *People v. Spielman*, *supra*, § 48; *Whart. Crim. Law*, 8th ed. § 1184.

⁴ *R. v. Francis*, 12 Cox C. C. 612; L. R. 2 C. C. 128. In his opinion Lord Coleridge said: "In this case the question reserved for the court is, whether the evidence mentioned in

the case was properly received for the purpose of proving guilty knowledge. No question is reserved as to the weight of that evidence, the judge who tried the case not entertaining any doubt that, if the evidence was properly received, the verdict was justified. It seems clear upon principle that, when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to show that he had been pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive; for a man may be many times under a similar mistake, or may be many times the dupe of another. But it is less likely he should be so oftener than once, and every circumstance which shows that he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last. . . . Now, in the present case, the prisoner was tried on two charges of attempting on the 8th of January, at Northampton, to obtain money from two different pawnbrokers by the false pretence that a worthless piece of jewelry consisted of real stones, and evidence

trial for embezzlement, cognate embezzlements may be proved ;¹ and on a trial for perjury, cognate perjuries.²

§ 54. Ordinarily, when a party is indicted or sued for injury flowing from negligence imputed to him, it is irrelevant, *In negli-* for reasons already given, to prove against him other *gence.* disconnected though similar negligent acts. On an indictment against a surgeon, for instance, for negligent manslaughter, other acts of negligence by the defendant are inadmissible.³ So where the question, in a suit against a railway company, is whether a driver was negligent on a particular occasion, it is irrelevant to prove that he had been negligent on other occasions.⁴

But when a party is charged with the negligent use of a dangerous agency, and the case against him is that he did not use care proportionate to the danger, then the question becomes material whether he knew, or ought to have known, the extent of the danger. On such an issue as this it is relevant for the party aggrieved to prove disconnected acts, of which the defendant should have been cognizant, and which, if he were cognizant of them, would have divulged to him the extent of the danger, and would have made it his duty to take precautions which

that he, on the 6th of January, at Bedford, obtained money from another pawnbroker on the pledge of a chain which he represented to be gold, when it in fact was not gold, was surely matter from which the jury might infer that he was pursuing a course of cheating pawnbrokers, by knowingly passing off on them false articles under the pretence that they were genuine; and that inference was greatly strengthened by the fact that he at that time gave a false name. And though the charge on which he was tried was for attempting to pass off a false ring, the inference that he had a guilty knowledge is as legitimate as if it had been a second false chain. It was objected that the evidence of what took place at Leicester was not properly received, because the cluster ring which he there attempted to pass was not produced in

court, and that the evidence of two witnesses who saw it, and swore to its being false, was not admissible. No doubt, if there was not admissible evidence that this ring was false, it ought not to have been left to the jury. But though the non-production of the article may afford ground for observations more or less weighty, according to the circumstances, it only goes to the weight, not to the admissibility, of the evidence, and no question as to the weight of this evidence is now before us."

¹ *R. v. Richardson*, 8 Cox C. C. 448; 2 F. & F. 343.

² *State v. Raymond*, 20 Iowa, 582.

³ *R. v. Whitehead*, 3 C. & K. 202.

⁴ Whart. on Ev. § 40; *Maguire v. R. R.* 115 Mass. 240; *Blair v. Pelham*, 118 Mass. 420; *Coale v. R. R.* 60 Mo. 232; *Louisville R. R. v. Fox*, 11 Bush, 495.

would have averted the danger. Thus, in an action against a railroad company for injuries sustained from a car running off the track, evidence has been received to prove seven or eight runnings off the track on the same road, by the same line of cars, in the previous month.¹ So in a suit by A. against B. for damages to A. from a ferocious dog negligently kept by B., it has been held relevant for A. to show that the dog had previously bitten X., Y., and Z., and that they had complained to B. of their hurts so sustained.²

§ 55. When good faith is at issue, it is relevant to put in evidence facts from which such good faith is inferable.³ Good faith may be inferred from facts. One of the most striking illustrations of this rule is to be found in homicide cases, in which it is admissible, in order to sustain the good faith of a party who claims that he believed he was acting in self-defence, for him to show that he had been advised of threats by his assailant to take his life.⁴ So in a leading English case, where the hypothesis on which the plaintiff rested was that he was insane at the time of a particular contract, it was held admissible for him, in order to sustain the good faith of this hypothesis, and the fact that his insanity must have been known to the other contracting parties, to prove, by his conduct at the time in question, that he must have been regarded as insane by those who dealt with him.⁵

§ 56. Prudence and diligence at a particular juncture may in like manner be proved by facts from which such prudence or diligence may logically be inferred.⁶ So as to prudence and diligence. For instance, on a question as to whether an engineer, in the management of a train at a collision, acted prudently, there is no doubt that it would be admissible to prove the cries of by-

¹ *Mobile R. R. v. Ashcroft*, 48 Ala. 15.

² *Stephen's Evidence*, 17, citing *Roscoe's Nisi Prius*, 739; *Whart. on Neg.* 912; *Worth v. Gilling*, L. R. 2 C. P. 1; *Kittredge v. Elliott*, 16 N. H. 77; *Whittier v. Franklin*, 46 N. H. 23; *Arnold v. Norton*, 25 Conn. 92; *Buckley v. Leonard*, 4 Denio, 500; *Cockerham v. Nixon*, 11 Ired. L. 269; *McCaskill v. Elliot*, 5 Strobb. 196; *Keenan v. Hayden*, 39 Wis. 558. See

fully *Grand Trunk R. R. v. Richardson*, 91 U. S. 454; and other cases cited in *Whart. on Ev.* § 43.

³ See *infra*, § 727.

⁴ *Whart. on Homicide*, § 694. See *infra*, § 757.

⁵ *Beavan v. McDonnell*, 10 Exch. 188. For other illustrations see *Whart. on Ev.* § 55.

⁶ As to presumption of prudence in danger see *infra*, § 732.

standers, without producing such by-standers.¹ So in all cases in which prudence and diligence are to be shown, it is admissible to put in evidence all the facts by which prudence and diligence are to be gauged.²

§ 57. While a defendant's character is presumed to be good until it is impeached, it is always admissible for him to put in evidence that his character was such as to make it unlikely that he would have perpetrated the act charged upon him.³ It is also sometimes relevant to put in evidence the character of the person on whom the crime was alleged to have been committed. There are also cases in which the reputation of persons visiting houses of alleged ill-fame is admissible.⁴ The conditions of such relevancy will now be considered.

§ 58. Character, in the sense in which the term is used in jurisprudence, means the estimate attached to the individual by the community, not the real qualities of the individual as conceived by the witness. In other words, it is not what the individual in question really is, but what he is held to be by the society in which he moves. "Character," therefore, is to be regarded as convertible with "reputation."⁵ A witness, therefore, who is called to speak to character, — unlike a master who is asked for the character of his servant, — cannot give the result of his own personal experience and observation, or express his own opinion, but in strict law he must confine himself to evidence of mere general repute.⁶ And in view of the fact that "the best character is generally that which is the least talked about," the courts have found it necessary to permit witnesses to give negative evidence on the subject, and to state that "they never heard anything *against* the character of the person on whose behalf they have been called."⁷

¹ Taylor v. Willans, 2 B. & Ad. 845. See *infra*, § 272.

² *Infra*, § 732. See Whart. on Neg. §§ 26-69.

³ See cases cited *infra*, § 67.

⁴ See *infra*, §§ 260, 261.

⁵ Whart. on Ev. § 564; R. v. Rowton, L. & C. 520; 10 Cox C. C. 25;

Knobe v. Williamson, 17 Wall. 586; Wetherbee v. Norris, 103 Mass. 566;

Snyder v. Com. 85 Penn. St. 519; People v. Garbutt, 17 Mich. 9. But see Martz v. State, 26 Oh. St. 162.

⁶ Taylor's Ev. § 325 A.

⁷ Cockburn, C. J. L. & C. 536; 10 Cox C. C. 34; R. v. Turner, 6 How.

§ 59. Good character, as we have seen, being presumed, evidence to support it will not be received until it is assailed.¹

Burden on party assailing character.

§ 60. While the defendant is allowed to call witnesses to speak generally as to his character, prior to the contested act, he cannot give evidence of particular acts, unless such evidence tends directly to the disproof of some of the facts put in issue by the pleadings.² And the character he is entitled to prove must be such as would make it unlikely that he would be guilty of the particular crime with which he is charged.³ Hence evidence in a homicide case that

Defendant may show a character inconsistent with the crime charged.

St. Tr. 613; *Gandolfo v. State*, 11 Oh. St. 114; *State v. Lee*, 22 Minn. 407.

¹ Buller, N. P. 296; *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25; *State v. Lapage*, 57 N. H. 245; *Turner v. Com.* 86 Penn. St. 54, and cases cited *infra*, § 64; and see Whart. on Ev. § 59, for civil cases.

² Archb. C. P. 104; 2 Russ. Cr. & M. 784; *R. v. Stannard*, 7 C. & P. 673; *Com. v. Hardy*, 2 Mass. 317; *State v. Wells*, Cox R. 424; *Com. v. Webster*, 5 Cush. 324; *Thomas v. People*, 67 N. Y. 218; *Kistler v. State*, 54 Ind. 460; *Hopps v. People*, 31 Ill. 385; *State v. Kinley*, 43 Iowa, 294; *Carson v. State*, 50 Ala. 135; *Drake v. State*, 51 Ala. 30; *Davis v. State*, 10 Ga. 101; *Coffee v. State*, 1 Tex. Ap. 548; *Lee v. State*, 2 Tex. Ap. 388.

³ 2 Russ. Cr. & M. 784; 1 Greenl. on Ev. § 54; *R. v. Clarke*, 2 Stark. 241; *R. v. Hodgson*, R. & R. 211; *R. v. Stannard*, 7 C. & P. 673; *Com. v. Hardy*, 2 Mass. 300; *Com. v. Webster*, 5 Cush. 524; *Andrews v. Vanduzer*, 11 Johns. 38; *Kauffman v. People*, 11 Hun, 82; *Frazier v. R. R.* 38 Penn. St. 104; *Gandolfo v. State*, 11 Oh. St. 114; *Hopps v. People*, 31 Ill. 385; *People v. Garbutt*, 17 Mich. 9; *Sawyer v. Eifert*, 2 Nott & M. 511; *Davis v. State*, 10 Ga. 101; *State v. Torney*, 13 Mo. 455; *State v. Dalton*, 27 Mo. 12; *Kee v. State*, 28 Ark. 155;

People v. Josephs, 7 Cal. 129; *People v. Fair*, 43 Cal. 137; *Coffee v. State*, 1 Tex. Ap. 548. As taking a wider range see *People v. Bodine*, 1 Denio, 281. It has been held not to be error in a homicide case to reject an offer to prove that the prisoner "always had been known as a kind-hearted man," if the rejection be accompanied by permission to show his character for peacefulness, &c., toward the deceased, or in any other matter bearing on the prosecution. *Cathcart v. Com.* 37 Penn. St. 108. In *Com. v. Twitchell*, 1 Brewst. 563, while the defendant's general character for peace was held admissible, he was not allowed to give evidence of his "mild and pacific habits." Compare *People v. Fair*, 43 Cal. 137. *Infra*, § 64.

The reasoning which requires that the character proved should be such as to make it improbable that the defendant committed the offence charged is of the same nature as that which permits, as we have already seen, proof of independent offences, in order to establish system. Such offences must be cognate: if of a different type they cannot be proved. So with character. Thus, to murder, as we have seen, a character for peacefulness may be proved; to larceny, a character for honesty; to treason, that of loyalty; to adultery, that of chastity.

the defendant when in the army was reputed a good and valiant soldier, is inadmissible.¹ The immediate object for which such evidence is introduced is to disprove guilt, but it is also admissible on a trial for murder, to aid the jury in ascertaining the probable grade of the offence.²

§ 61. Where a defendant has voluntarily put his character in issue, and evidence for the prosecution has been introduced in rebuttal, it has been said that the examination may be extended to particular facts;³ though this has properly been denied in most jurisdictions,⁴ and viewing the question in regard to principle, we must hold it to be oppressive to a defendant, as well as irrelevant to the real issue, to admit in rebuttal, on whatever pretext, a series of independent facts, forming each a constituent offence.⁵ Rebutting evidence of bad reputation is, however, admissible.

Prosecution cannot rebut by particular facts.

"Quiet and peaceable character" may be proved in defence to an indictment for rape. *State v. Lee*, 22 Minn. 407; and truthfulness to an indictment for perjury. *R. v. Hemp*, 5 C. & P. 468; *Whart. Crim. Law*, 8th ed. § 1327.

¹ *People v. Garbutt*, 17 Mich. 9.

² *Carroll v. State*, 3 Humph. 315. See also *People v. Stewart*, 28 Cal. 395; *People v. Gleason*, 1 Nev. 173; and, see, as differing from the text, *Com. v. Twitchell*, 1 Brewst. 563.

³ *Com. v. Robinson*, Thach. C. C. 230; *State v. Jerome*, 33 Conn. 265.

⁴ *Fountain v. Boodle*, 3 Q. B. 3; *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25; *State v. Lapage*, 57 N. H. 245; *Com. v. Webster*, 5 Cush. 295; *Peterson v. Morgan*, 116 Mass. 350; *Com. v. O'Brien*, 119 Mass. 342; *People v. White*, 14 Wend. 111; *Snyder v. Com.* 85 Penn. St. 519; *McCarty v. People*, 51 Ill. 231; *Keener v. State*, 18 Ga. 194; *State v. Hare*, 76 N. C. 591; *State v. Laxton*, 76 N. C. 564.

⁵ *Com. v. Sackett*, 22 Pick. 394; *Com. v. Webster*, 5 Cush. 314; *People v. White*, 14 Wend. 111; *Bennett v. State*, 8 Humph. 118; *Brownell v. Peo-*

ple, 38 Mich. 732; *contra*, *R. v. Burt*, 5 Cox C. C. 284, overruled by *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25.

A man was indicted for an indecent assault, and upon the trial called witnesses, who gave him a good character as a moral and well-conducted man, and a witness was then called by the prosecution, who was asked, "What is the prisoner's general character for decency and morality?" and in answer said, "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man of the grossest indecency and the most flagrant immorality." It was held that the answer was not admissible in evidence. The rule was declared to be, that evidence of character must be evidence of general reputation only, and a witness's individual opinion respecting the character and disposition of the prisoner, with reference to the charge, is inadmissible. *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25.

§ 62. If a person on trial for an alleged offence offer no evidence of his good character, no legal inference can arise from such omission that he is guilty of the offence charged, or that his character is bad.¹

No presumption to be drawn from non-production of such evidence.

§ 63. When the defendant introduces evidence for the purpose of proving his general good character previous to the date of the transaction charged against him, this cannot be rebutted by evidence of bad character after the act;² and in one case the prosecutor was not allowed to inquire of the witness what he had learned of the character of the prisoner previous to the date of the transactions, by conversation had since such date with persons acquainted with the prisoner;³ though evidence of bad character subsequent to the crime has been received in Massachusetts.⁴ The prosecution cannot rebut by showing that in *particular localities* the defendant's character was bad, he never having *lived* in such places.⁵

Prosecution cannot rebut by showing bad character after the act, or in localities where defendant had not lived.

§ 64. Unless, however, the defendant puts his character in issue, the prosecution cannot call witnesses to impeach it;⁶ and where the defendant, in part of a confession, said he was an old convict, the court held that part of the confession inadmissible.⁷ Bad reputation, however, when part of the offence (*e. g.* when the party is charged as a "common thief"), may be proved by prosecution.⁸

Prosecution cannot impeach unless defendant puts in issue.

¹ State v. Upham, 38 Me. 261; State v. Tozier, 49 Me. 404; Ackley v. People, 9 Barb. 609; People v. Bodine, 1 Denio, 281; Donaghoe v. People, 6 Parker C. R. 120; State v. O'Neal, 7 Ired. 254; Cluck v. State, 40 Ind. 263; State v. Kabrich, 39 Iowa, 277; State v. Dockstader, 42 Iowa, 436; though see State v. McAlister, 24 Me. 139.

² State v. Johnson, Wins. (N. C.) 152; Wroe v. State, 20 Ohio St. 460; 1 Phil. Ev. c. 7, § 7.

³ Carter v. Com. 2 Va. Cas. 169.

⁴ Com. v. Sacket, 22 Pick. 394.

⁵ Griffin v. State, 14 Ohio St. 55.

⁶ Buller, N. P. 296; State v. Lapage, 57 N. H. 245; Com. v. Hardy, 2 Mass. 317; Com. v. Webster, 5 Cush. 325; People v. White, 14 Wend. 111; State v. O'Neal, 7 Ired. 251; Carter v. Com. 2 Va. Cas. 169; Griffin v. State, 14 Oh. St. 55; Fanning v. State, 14 Mo. 386; State v. Creson, 38 Mo. 372; Com. v. Hopkins, 2 Dana, 418; Young v. Com. 6 Bush, 312.

⁷ People v. White, 14 Wend. 111. See State v. Lapage, 57 N. H. 245; State v. Hare, 74 N. C. 391.

Upon an indictment for assaulting an officer, where the assault was committed by the prisoner in resisting

§ 65. While, however, bad character cannot be put in issue by the prosecution, it is permitted, as just seen, to introduce evidence of extraneous misconduct, where it is relevant either (1.) as part of the *res gestae*; (2.) as part of a system; (3.) to prove guilty knowledge; (4.) to prove intention; or (5.) to prove identity.¹

But while particular acts may be proved to show malice or *scienter*, it is inadmissible to prove, either in this or in any other way, that the defendant had a *tendency* to commit the crime charged.² Hence, it has been correctly held that on an indictment against an overseer on a plantation for the murder of a slave, evidence as to the prisoner's general habits in punishing other slaves is not admissible for the prosecution.³ For it would be in contravention of the sanctions of the common law, if a man's having been guilty of other offences, or having a tendency to commit them, should be received as evidence to rebut the presumption of his innocence of a particular charge.⁴ Nor is it

his arrest by the officer for a felony, the officer cannot, upon his examination in chief, be questioned as to his knowledge of the prisoner's character for the purpose of showing that he had reasonable cause to suspect the prisoner of having committed the felony for which he was arrested. The proper course, under such circumstances, is to ask the officer generally whether he had reason to suspect the prisoner, leaving the prisoner's counsel to inquire into the grounds of suspicion, if he thinks fit to do so. *R. v. Tuberfield*, L. & C. 495; 10 Cox C. C. 1.

An exception to the rule above given exists in cases of prosecutions in which it is material to prove that the defendant held himself out as having a particular character. *Antle v. State*, 6 Tex. Ap. 202.

¹ See *supra*, §§ 31 *et seq.*, 46.

² 1 Phillips Ev. 499; *R. v. Oddy*, 5 Cox C. C. 210; 2 Den. C. C. 264; *R. v. Cole*, 1 Russ. C. & M. 939; *State v. Lapage*, 57 N. H. 245; *Albright v.*

State, 6 Wis. 74; *People v. Jones*, 31 Cal. 565.

³ *Dowling v. State*, 5 Sm. & M. 664. See *Cheny v. State*, 7 Ohio, 222.

⁴ *State v. Renton*, 15 N. H. 169. See *People v. White*, 14 Wend. 111; *State v. Jackson*, 17 Mo. 544.

On the trial of Mrs. Fair in California, in 1872, for the murder of Crittenden (*People v. Fair*, 43 Cal. 137; 1 Green C. R. 217), the evidence being that the defendant claimed to have been the mistress of the deceased, the defendant's counsel offered evidence to show that the defendant's prospects had been ruined by the conduct of the deceased. The prosecution then offered to prove the previous bad character of the defendant for chastity. This evidence was admitted by the court trying the case, but this admission was held error by the Supreme Court. "The defence relied on in this cause," said Crockett, J., "is, that at the moment when the fatal shot was fired the accused was laboring under a temporary in-

admissible to prove, as part of the prosecution's case, the defendant's ability to commit the offence; *e. g.* in cases of forgery, that he was skilful in imitating writing.¹ On the other hand, that he had by him weapons suitable to the commission of the offence

sanity, proceeding from certain physical causes, aggravated by the extraordinary mental excitement occasioned by the circumstances which immediately preceded the killing. The proof of the defendant's bad reputation for chastity was offered and submitted, solely on the ground that it tended to rebut the inference that the alleged mental excitement of the defendant was occasioned by a sense of shame and mortification which she experienced on account of the damage which she supposed her reputation had suffered by reason of her connection with Crittenden. The proof was, therefore, admitted for the purpose of throwing some light on the question of her mental condition at the moment when the deed was committed. If the defendant had offered any proof whatever that, previous to her relation with Crittenden, her reputation for chastity was good, and that the damage to that reputation which ensued from her connection with Crittenden so preyed upon her mind, in her then state of physical debility, as to result in a state of temporary insanity, it would have been clearly competent for the prosecution to rebut this presumption by proof that she had no reputation to lose, and consequently that she could not have experienced any great mental excitement occasioned by the loss of a reputation which she did not possess. But the defendant offered no proof whatever as to her previous reputation; and even in her own account of the transaction, and of the state of her mind at the time, did not attribute her alleged temporary insanity to any mental excitement resulting from a sup-

posed loss of her reputation. On the contrary, she attributes it partly to her physical condition and partly to the excitement produced by a fear that she was about to lose, or was in danger of losing, the affections of Mr. Crittenden, to which, it appears, she claimed to have a better right than his lawful wife. In the absence of all proof on her part tending to show that her alleged mental aberration was in any degree produced by a sense of shame or mortification occasioned by any damage to her good name, it was not competent for the prosecution to prove that her reputation for chastity was bad. She had offered no proof tending to show that it was good, and she did not pretend, in her version of the transaction, that her alleged insanity resulted in any degree from the loss of a previously good reputation. I am therefore of opinion that the proof offered by the prosecution on this point was improperly admitted, inasmuch as it did not tend to rebut any proof offered by the defence, nor to elucidate the causes to which she attributes her alleged insanity. I have deemed it proper to add my views on this branch of the case to those of Mr. Justice Wallace, not because I dissent from any proposition stated by him, but for the reason that it has been insisted with much earnestness by the counsel for the prosecution, that the proof of reputation in this case does not fall within the general rule which allows the reputation of the accused to be assailed only in rebuttal of proof of a good reputation offered by the defendant."

¹ *State v. Hopkins*, 50 Vt. 316.

charged, is always a proper ingredient of the case of the prosecution. The question, when evidence of aptitude is offered, is one of logic. Is the aptitude sought to be charged on the defendant one that he possesses in common with a multitude of others? Then proof of such aptitude cannot be received unless, the *corpus delicti* being proved, a defence based on the defendant's inaptitude is set up. On the other hand, when the aptitude is special to himself (*e. g.* when the offence was committed by a person peculiarly skilled in poisons, or in the mode of inflicting wounds), then the evidence is to be received at least in rebuttal.¹

§ 66. It has been argued by high authorities² that good character is of weight only in doubtful cases. But the better opinion is to the contrary.³ In the first place, it is conceded on all sides that evidence of character, when offered by the defence in criminal cases, is always relevant.

¹ See *supra* § 50; *infra*, §§ 772-3.

² 1 Stark. on Ev. (10th Am. ed.) 73; 1 Phillips on Ev. 469; *U. S. v. Smith*, 2 Bond, 323; *U. S. v. Roudenbush*, 1 Bald. 514; *Com. v. Webster*, 5 Cush. 595; *Lowenberg v. People*, 5 Parker C. R. 414; *Rollins v. State*, 62 Ind. 46.

³ 2 Green. on Ev. § 25; 2 Ben. & Heard Lead. Cas. 351.

"It has been usual," says Sir W. Russell, "to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference, that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which

ought *always* to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their own conclusion upon the evidence whether an individual, whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer." 2 Russ. Cr. & M. 785. See also *Com. v. Hardy*, 2 Mass. 317; *Felix v. State*, 18 Ala. 720.

"To these remarks," says Mr. Justice Talfourd, "we may be permitted to add that, according to the language frequently adopted by judges in their charges, it may be proved that character is in no case of any value. They say that in a clear case character has no weight; but if the case be doubtful, — if the scale hangs even, — then the jury ought to throw the weight of

Technically, therefore, it is always material. If immaterial, it should be rejected as irrelevant; but it can never be rejected as irrelevant, therefore it can never be regarded as immaterial. To this it is answered that the court, when admitting it as relevant, does not decide on its materiality, materiality being for the jury. But this virtually concedes that the question is one of logic and not of law. It makes the weight of evidence as to

character into the scale, and allow it to turn the balance in the prisoner's favor; but the same judges will tell juries, 'that in every doubtful case they ought to acquit,' stopping far short of the even balance, and that the prisoner 'is entitled to the benefit of every reasonable doubt;' in clear cases, therefore, the character is of no avail, and in doubtful cases it is not wanted: it is never to be considered by the jury but when the jury would acquit without it. The sophism lies in the absolute division of cases into clear and doubtful, without considering character as an ingredient which may render that doubtful which would otherwise be clear. There may certainly be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character will actually outweigh evidence which might otherwise appear conclusive. It is in truth a fact varying greatly in its own intrinsic value, according to its nature; varying still more in its relative value, according to the proofs to which it is opposed; but always a fact, fit, like all other facts proved in the cause, to be weighed and estimated by the jury." *Dickinson*. Quar. Ses. 6th ed. 563. See *Remsen v. People*, 57 Barb. 324; *Epps v. State*, 19 Ga. 102; *Harrington v. State*, 19

Oh. St. 264. Cf. article in 20 Alb. L. J. 48. Hence it has been held to be error in a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf;" *State v. Henry*, 5 Jones (N. C.), 65; the true rule being, that in all cases a good character is to be considered of weight. *U. S. v. Whitaker*, 6 McLean, 342; *Cancemi v. People*, 16 N. Y. 501; *Stover v. People*, 56 N. Y. 315; *Heine v. Com. S. C. Penns.* 1879; *Com. v. Carey*, 2 Brewst. 404; *Harrington v. State*, 19 Oh. St. 264; *Stewart v. State*, 22 Oh. St. 477; *People v. Garbutt*, 17 Mich. 9; *Jupitz v. People*, 34 Ill. 516; *State v. Northrup*, 48 Iowa, 583; *State v. Gustavson*, 50 Iowa, 194; *State v. Horning*, 49 Iowa, 158; *Kistler v. State*, 54 Ind. 400; *State v. Ford*, 3 Strobb. 517; *Epps v. State*, 19 Ga. 102; *Fields v. State*, 47 Ala. 603; *Carson v. State*, 50 Ala. 134; *Williams v. State*, 52 Ala. 411; *State v. McMurphey*, 52 Mo. 251.

In *People v. Stewart*, 28 Cal. 396, it was intimated that good character is of weight only in doubtful cases. This was overruled in *People v. Ashe*, 44 Cal. 288, where it was held that good character is always entitled to weight. S. P., *People v. Bell*, 49 Cal. 486; *People v. Shepardson*, 49 Cal. 629.

character dependent, not on any rules arbitrarily pre-assigned, but on the facts of each particular case.

§ 67. The weight to be attached to evidence as to character, in fact, depends as much on the quality of character sought to be established as on the quality of the evidence produced on the opposite side. A character such as that of Mr. Wilberforce, for instance, if offered on part of a defendant charged with larceny, would cast reasonable doubt on any prosecution, no matter how strong its case might be. And then in addition, as is substantially argued by Talfourd, J.,¹ it is a *petitio principii* to say that evidence as to character is entitled to weight only in doubtful cases, when really it is to make the case doubtful that such evidence is offered. In some instances, in which guilt would otherwise be established beyond reasonable doubt, evidence of good character may justly produce an acquittal. In other cases it may be inoperative. But in all cases it is an item of proof to be considered by a jury.

§ 68. When A. is charged with killing B., it is no defence for A. to say, "I killed him because he was a bad man." Hence when the defendant offers to prove, as a defence, that the deceased was a man of ferocious character, or an assassin, or a highway robber, or a garroter, this, by itself, is irrelevant. If the deceased's character was thus infamous and desperate, and the defendant had reason to fear violence from him, then the defendant's remedy was to apply to the law for protection. For him to take the law in his own hands and kill the deceased is murder; and hence, as it is no defence for him, when the case against him is one of deliberate killing not in self-defence, that the deceased was a bad man, evidence of such badness is irrelevant if offered by him on the trial.²

¹ See preceding note.

² State v. Field, 14 Me. 248; Com. v. York, 9 Met. 110; Com. v. Wilson, 1 Gray, 337; Com. v. Hilliard, 2 Gray, 294; Com. v. Mead, 12 Gray, 168; Shorter v. People, 2 Comst. 197; S. C., 4 Barb. 460; Egglar v. People, 3 N. Y. Supreme Court, 796; S. C., 56 N. Y. 642; Com. v. Ferrigan, 44

Penn. St. 386; Com. v. Lenox, 3 Brewst. 249; State v. Thawley, 4 Harring. 562; Dock v. Com. 21 Grat. 909; Campbell v. People, 16 Ill. 17; State v. Tilly, 3 Ired. 424; Haynes v. State, 17 Ga. 465; Wesley v. State, 37 Miss. 327; State v. Jackson, 17 Mo. 544; State v. O'Brien, 10 La. An. 453; State v. Jackson, 12 La.

§ 69. In homicide, and in other cases of violent assault, a danger which is apparently imminent is to be viewed, provided the person assailed honestly believe in its reality and imminency, as if it were actually real and imminent.¹ It makes no difference, so far as concerns the question immediately before us, whether we assume, as do some of the authorities, that the danger must have been apparent to "reasonable men," or whether we hold it must have been apparent to the defendant himself. Either way, the conclusion reached at the time of the conflict, as to the "apparency" of the danger, must be greatly affected by the assailant's character for ferocity, brutality, and vindictiveness, as well as by his special animosity to the assailed. There can be no question, in such a case, of the right to prove that the deceased was armed with gun or sword; why not that he was armed with enormous bodily strength and desperate rage?² Specific threats to the defendant can be put in evidence; why not a general ferocity of temper which vents itself on all by whom it is crossed, and which spares not life in its fury? Suppose a Thug should infest a community, and that the defendant should discover such an assailant in his chamber, would it be inadmissible, on the plea of *se defendendo*, to prove that he was a Thug? The great point to be made out on the plea of self-defence is that the defendant was pushed to the wall, or that he could only protect himself, his family, or his house, from felony, by taking the assailant's life. And the necessity of such extreme action can only be shown by proving that the assailant was so armed, and was

Otherwise
in assault
or homi-
cide cases
when self-
defence is
first
proved.

An. 679; *Wise v. State*, 2 Kans. 419; *State v. Riddle*, 20 Kans. 711; *People v. Murray*, 10 Cal. 309; *Henderson v. People*, 12 Tex. 525.

So the State cannot prove particular acts of violence of deceased as constituting general bad character. *Pound v. State*, 43 Ga. 88.

That deceased "had been engaged in several fights with other persons, in each of which he used a knife and cut his opponent," and that this had been communicated to prisoner, was held inadmissible as proof of specific facts,

in a case where the defendant had previously put in evidence of the general quarrelsome character of the deceased. *Thomas v. People*, 67 N. Y. 218.

Nor can the prosecution put in evidence, in advance of proof of self-defence, the good character of the deceased. *State v. Potter*, 13 Kans. 414.

¹ See Whart. on Hom. § 606.

² That evidence as to strength is admissible see *Wellar v. People*, 30 Mich. 16; and see Whart. Crim. Law, 8th ed. §§ 488 *et seq.*

guided by such violent purposes, as to make other and milder means of defence inadequate. The law excuses on this ground a homicide of one entering a house in the night-time far more readily than that of one entering in the day, because, it says, "entering a house in the night-time leads to an inference of a felonious intent." So, to prove this felonious intent, specific acts of guilt, pointing in the same direction, and prior attempts, may under certain conditions be proved. The general principle, then, is this: not that it is lawful coolly to attack and kill a person of ferocious and blood-thirsty character, for it is as much murder in such manner to kill the most desperate of men as to kill the most inoffensive; but that, whenever it is shown that a person honestly and non-negligently believed himself attacked, it is admissible for him to put in evidence whatever could show the *bona fides* of his belief. He may prove that the person assailing him had with him burglars' instruments; or was armed with deadly weapons; or had been lurking in the neighborhood on other plans of violence. He is entitled to reason with himself in this way: "This man comes to my house masked, or with his face blacked; he is the same who has been prowling about my house, and is connected with other felonious plans; I have grounds to conclude that such is his object now." And if so, he is also entitled to say: "This man now attacking me is a notorious ruffian; he has no peaceable business with me; his character and relations forbid any other conclusion than that his present attack is felonious." And if he thus has reason to expect, and to defend himself against, a desperate conflict, of these facts he is entitled to avail himself on trial. He must first prove that he was attacked; and this ground being laid, it is legitimate for him to put in evidence whatever would show he had reason to believe such attack to be felonious.¹

¹ *Infra*, § 257; *State v. Lull*, 48 Vt. 581; *Pfomer v. People*, 4 Parker C. R. 558; *Patterson v. State*, 46 Barb. 625; *Com. v. Seibert*, Whart. on Hom. § 610; *Marts v. State*, 26 Oh. St. 162; *State v. Tackett*, 1 Hawks, 210; *State v. Smith*, 12 Rich. 430; *State v. Turpin*, 77 N. C. 473; *Monroe v. State*, 5 Ga. 85; *Hinch v. State*, 25 Ga. 699;

Pritchett v. State, 22 Ala. 39; *Quesenberry v. State*, 3 Stew. & P. 315; *Dupree v. State*, 33 Ala. 380; *Franklin v. State*, 29 Ala. 14; *Eiland v. State*, 52 Ala. 322; *State v. Hicks*, 27 Mo. 588; *State v. Keene*, 50 Mo. 359; *State v. Bryant*, 55 Mo. 75; *State v. Harris*, 59 Mo. 550; *State v. Elkins*, 63 Mo. 159; *Cotton v. State*, 31 Miss.

§ 70. In England we have no authority direct to this particular point. Intimations, however, from eminent judges, ^{England.} would lead us to believe that evidence of the deceased's ferocity and vindictiveness would not be refused where there is a *prima facie* case of self-defence laid by the defendant. Thus, in a capital case, Garrow, B. told a jury: "But here the life of the prisoner was threatened, and *if he considered his life in actual danger*, he was justified in shooting the deceased as he had done; but if, *not considering* his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter." ¹ And Lord Tenterden, also, in a capital case,

504; Chase v. State, 46 Miss. 705; State v. Robertson, 30 La. An. 340; Payne v. Com. 1 Metc. (Ky.) 370; Wright v. State, 9 Yerg. 342; Rippey v. State, 2 Head, 217; Harman v. State, 3 Head, 243; Little v. State, 6 Baxt. 491; De Forest v. State, 21 Ind. 23; Fahnestock v. State, 23 Ind. 281; Wise v. State, 2 Kans. 419; Pond v. People, 8 Mich. 150; State v. Neeley, 20 Iowa, 108; State v. Dumphey, 4 Minn. 438; Pridgen v. State, 31 Tex. 420; Dorsey v. State, 34 Tex. 651; Horbach v. State, 43 Tex. 242; Stevens v. State, 1 Tex. Ap. 591; Hudson v. State, 6 Tex. Ap. 565; Lewallen v. State, 6 Tex. Ap. 475; People v. Murray, 10 Cal. 309; People v. Edwards, 41 Cal. 640.

In Vermont we have an interesting ruling supporting the conclusion of the text. The keeper of a prison was indicted for an assault on a prisoner. The evidence was that the latter, when encountered by the former, was armed with a hammer, and looked nervous and excited. It was held admissible for the keeper to put in evidence statements made to him by the sheriff, who brought in the prisoner, to the effect that the prisoner was dangerous and desperate. State v. Lall, 48 Vt. 581.

In Brownell v. People, 38 Mich. 735, Campbell, C. J., said:—

"The defence rested upon the grounds, among others, that Brownell used a pistol to repel an assault which was not only violent in fact, but made by a powerful man of dangerous temper, who had made threats against him. Looking at the case in a common sense light, we cannot avoid seeing that any person would naturally be more in fear of a man of that sort than of a quiet or a weaker man, and would, in case of an attack from him, feel a greater need of extreme measures to protect himself and resist his adversary. Inasmuch as every one finds his excuse in facts as they honestly appear to him, such important facts as these cannot be disregarded.

"The witnesses who were examined, or offered for examination, and whose testimony was excluded as inadmissible, were personally familiar with both parties, and capable of forming opinions about their relative strength, tempers, and other personal qualities, not capable of any description except by opinion. We think the testimony should have been received and not struck out. Hurd v. People, 25 Mich. 405."

¹ R. v. Scully, 1 C. & P. 319.

told the jury to "take into consideration the previous habits and connection of the deceased and the prisoner, with respect to each other."¹ Mr. Starkie lays down premises from which the same conclusion may be legitimately drawn: "On a charge of homicide, it may be for the jury to say whether the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independent of any intention to injure another, or even of carelessness or negligence; and according to that determination, the offence may amount to murder, or merely to manslaughter, or chance-medley. In order, however, to arrive at a just conclusion upon such questions, the jury ought to act upon those presumptions which are recognized by the law, as far as they are applicable, and *their own judgment and experience, as applied to all the circumstances and evidence.*"²

§ 71. In New York, in trials before Judge Platt³ and Judge Van Ness,⁴ evidence of the vindictive temper of the deceased was held admissible. In 1866 the question was brought before the Court of Appeals in a case where the point was elaborately and ably argued.⁵ The result reached was, that though evidence of the defendant's ferocity and vindictiveness would be admissible when a case of self-defence was laid, it was inadmissible without such a prerequisite.⁶

In a case which came before the Court of Appeals in 1874,⁷ the reporter tells us that "after general evidence had been given on behalf of the prisoner tending to show that the deceased was disposed to be sullen and violent in temper when angry, and that when excited she was ungovernable and passionate; questions were then asked tending to show particular instances of exhibitions of temper. These were excluded under objection. The ruling was affirmed in the Court of Appeals." No reasons, however, were given. But the exclusion may be properly sustained

¹ R. v. Lynch, 5 C. & P. 324. See also R. v. Fisher, 8 C. & P. 182.

² 1 Stark. Ev. 66.

³ People v. Blake, 1 City Hall Rec. 100.

⁴ People v. Smith, 2 City Hall Rec. 77, 81.

⁵ People v. Lamb, 2 Keyes, 364.

⁶ See, to same effect, Pfomer v. People, 4 Parker C. R. 558; McKenna v. People, 18 Hun, 580.

⁷ Egger v. State, 56 N. Y. 642.

on the ground that the evidence offered went to particular facts and not to general character.¹

§ 72. In New Jersey, evidence of hostile and vindictive temper on part of the deceased was received in an early New Jersey. case,² Kirkpatrick, C. J. saying: "Inasmuch as the distinction between murder and manslaughter depends upon the impulse of the mind with which the act was committed, *every circumstance which goes to show the feelings of the parties towards each other* may be proper. That temper, which at one time might not be excited, might, under the excitement of other circumstances, be more easily roused, and, therefore, it may be received by the jury, to show the state of mind of the parties."

§ 73. In Pennsylvania, though the question has never been precisely determined by the Supreme Court, the practice has been to admit evidence of any facts or circumstances likely to show the condition of the defendant's mind as to the necessity of self-defence. This was done by a very able jurist, Judge King, on the trial of the Kensington and Southwark rioters in 1844-45; though he at the same time correctly ruled that if the defendant *negligently* reached honest though erroneous conclusions as to the reality of the danger to which he was exposed, this, while it lowered the grade of the homicide, did not justify an acquittal. And in an early case, evidence on part of the defence was admitted to show that the deceased was a hostile Indian.³

So Judge Conyngham, as distinguished for strong sense as he was for integrity and humanity, admitted in a homicide case, for the purpose of showing the honesty of the defendant's belief of impending danger, evidence of the ferocity and brutality of the deceased.⁴ And that evidence of the apparent imminency of the danger is admissible, whenever there is a *prima facie* case of self-defence, is logically deducible from the position rightly assumed by the courts of this State, that the defendant is to be judged by his own lights.

¹ See McKenna v. People, 18 Hun, 580; Thomas v. People, cited supra, § 69.

² State v. Zellers, 2 Halst. 230.

³ Penn. v. Robertson, Addison, 246.

⁴ Com. v. Seibert, Whart. on Hom. § 506-8. To the same effect is Com. v. Richmond, 6 Weekly Notes, 431.

It is true that subsequently the Supreme Court of the State¹ held that it was inadmissible for a defendant to prove generally the deceased's bad character, as a defence to an indictment for murder. But in this case self-defence was not pretended; and when the issue is deliberate killing, not in self-defence, no one questions the position that the defendant cannot defend himself on the ground that the deceased was a reprobate and deserved to be killed.

§ 74. North Carolina was one of the first States to lead off in affirming the admissibility of this kind of proof. The North Carolina question originally arose on an indictment against a white man for the murder of a slave; and it was ruled that in such an issue the defendant setting up self-defence could give in evidence that the deceased was turbulent and insolent to white persons.² Taylor, C. J., speaking for the Supreme Court, said: "It does not appear, from any direct proof in the case, what was the immediate provocation under which the homicide was committed. The evidence relative to that is altogether circumstantial and presumptive, and its weight and effect required the most careful examination and deliberation of the jury. The conclusion they might arrive at was all-important to the prisoner, since the degree of the homicide depended on it; and whether it was malicious, extenuated, or excusable, must have been determined by them from such lights as they could gather from the facts actually proved, and such inferences as they might deduce from them. It cannot be doubted that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing on this inquiry, and according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. *If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels, and existing causes of resentment he had against the prisoner, increase the probability that the latter had acted under strong and legal provocation.* If, on the contrary, the behavior of the deceased was usually mild and respectful towards white persons, nothing could be added by it

¹ Com. v. Ferrigan, 44 Penn. St. 386.

² State v. Tackett, 1 Hawks, 210.

to the force of the other circumstances. They must still depend upon their own weight, and the probability be lessened that the prisoner had received a provocation sufficient in point of law to extenuate the homicide. The evidence, therefore, ought to have been received, and this will be the more apparent when the charge to the jury is considered." It is true that this ruling was, in a subsequent case, declared to be exceptional and unauthoritative;¹ but in a still later adjudication by the same court,² while the general rule, that it is inadmissible for the defendant to put the deceased's character in issue, is properly reiterated, the exception established in Tackett's case is recognized as still in force, and as applicable to all cases of self-defence.

§ 75. In South Carolina, Georgia, Alabama, Kentucky, Tennessee, and Mississippi, we have rulings to the same effect.³ In these States the practice is to admit evidence of the deceased's character for ferocity, in all cases in which the defendant is shown to have been acting in self-defence.

§ 76. In Indiana the rule is thus expressed:⁴ "As a general rule, it is the character of the living—the defendant on the trial for the commission of crime—and not of the person on whom the crime was committed that is in issue, and as to which, therefore, that evidence is admissible. But in a case like the present, where the question arises whether the accused acted, in the commission of a homicide, upon grounds that justify him in the deed, it would seem that the character of the deceased might be a circumstance to be taken into consideration. Especially might this be the case where the accused knew that character, and also knew, at the time, the individual by whom the attack upon him or his property was made." The

South Carolina,
Georgia,
Alabama,
Kentucky,
Tennessee,
Mississippi.

Indiana.

¹ *Bottoms v. Kent*, 3 Jones, 154.

² *State v. Hogue*, 6 Jones, 381.

³ *State v. Smith*, 12 Rich. 430; *Monroe v. State*, 5 Ga. 85; *Haynes v. State*, 17 Ga. 465; *Quesenberry v. State*, 3 St. & Port. 308; *Pritchett v. State*, 22 Ala. 39; *Franklin v. State*, 29 Ala. 14; *Dupree v. State*, 33 Ala. 380; *Fields v. State*, 47 Ala. 603; reported at large in Whart. on Hom. §§ 613 et seq.; *Eiland v. State*, 52 Ala.

325. In *Bowles v. State*, 58 Ala. 335, it was said that such evidence is "not receivable when there is nothing in the conduct of the deceased at the time of the killing which it illustrates." See, to the same effect, *Payne v. Com.* 1 Metc. (Ky.) 370; *Rippy v. State*, 2 Head, 217; *Cotton v. State*, 31 Miss. 504; *Wesley v. State*, 37 Miss. 327.

⁴ *Dukes v. State*, 11 Ind. 557.

court add: "Where, as in this case, these facts may not have been known, we do not see how the evidence could be entitled to much weight."¹

§ 77. In Michigan, in a case tried in 1872,² the defendant offered to prove that "the deceased was a man of high temper and quarrelsome disposition, and known by the defendant to be so at the time of the shooting." The court below refusing to admit this evidence, the ruling was reversed by the Supreme Court. "The evidence," said Christiancy, C. J., "was admissible, since the knowledge or belief of the prisoner, that the person threatening him with an immediate personal attack is a man of high temper and quarrelsome disposition, is a most important circumstance, from which he is to estimate the probability and the character of the attack, and what course of conduct he has reason to expect from the assailant, as well as the means which, at the moment, he may deem necessary to guard himself from the threatened danger."

§ 78. In Minnesota the same distinction is taken: "The character of the deceased *per se*," said Flandrau, J.,³ "can never be material in the trial of a party for killing him, because it is as great an offence to kill a bad as it is to kill a good man, or to kill a quarrelsome and brutal man as it is to kill a mild and inoffensive man. Therefore, if the killing is proven to have been with a felonious intent, the character of the deceased can in no manner affect the result."

§ 79. On a trial for stabbing in Iowa, in 1870,⁴ the defendant offered to introduce evidence to show that McMillin, the person stabbed, was a large, powerful, and muscular man, who, when under the influence of liquor, was quarrelsome, ugly, dangerous, and vindictive; that defendant knew these facts; and, in connection with this offer, he also proposed to prove that on the same day, and shortly before the commission of the assault, McMillin had threatened to take defendant's life, of which threat he had been informed only a few minutes previous to the assault. The judge trying the case refused to ad-

¹ Aff. in *Holler v. State*, 37 Ind. 270; *Brownell v. People*, 38 Mich. 57. 732, quoted *supra*, § 69.

² *Hurd v. People*, 25 Mich. 405; affirmed in *People v. Lilly*, 38 Mich. ³ *State v. Dumphey*, 4 Minn. 438. ⁴ *State v. Collins*, 32 Iowa, 36.

mit this evidence, and this ruling was reversed by the Supreme Court, on the ground that the character of the assailant was one of the circumstances from which the intent and motive of the assailed, when defending himself, could be determined.¹

§ 80. In Missouri, in 1872, the law is thus tersely presented:² “When the homicide is committed under such cir-
Missouri
and Texas.
 cumstances that it is doubtful whether the act was committed maliciously, or from a well grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself. If such evidence is ever legitimate, the facts in this case show that it was one calling for its introduction.” And it was afterwards held that in a case of homicide, where it is doubtful whether the killing was from malice or from a well grounded apprehension of danger, it is proper to show that the deceased had the reputation of being a violent or dangerous man.³

The same distinction is taken in Texas.⁴

§ 81. In California, in 1858, the Supreme Court stated the rule as follows:—
California.

“The other point made is the exclusion of evidence of the character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defence. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof, to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal. But the record must show this state of case. This does not.”⁵

In 1871 this view was reaffirmed.⁶

¹ See Whart. on Hom. § 518.

² State v. Keene, 50 Mo. 357.

³ State v. Bryant, 55 Mo. 75.

⁴ Stevens v. State, 1 Tex. Ap. 591;

Horbach v. State, 43 Tex. 254; Hudson v. State, S. C. Tex. 1879.

⁵ People v. Murray, 10 Cal. 309.

⁶ People v. Edwards, 41 Cal. 640.
 Compare People v. Butler, 8 Cal. 435.

§ 82. Nor can the cases cited against this position be relied on to meet it on principle. Thus in a Maine case we find the following from Emery, J., when giving the opinion of the Supreme Court:—

Inconclu-
siveness of
cases cited
to the con-
trary.

“It would not be allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him. 1 Phil. Ev. 143. Although the deceased may have been a savage and quarrelsome man when intoxicated, he still was entitled to the protection of the law. He was not, from any evidence, unlawfully in the house. *We look in vain, among the attending circumstances of the melancholy catastrophe, for a provocation or an excuse for the resort to the deadly weapon, which the defendant used to destroy the life of his victim.* And to allow the introduction of evidence of the character of the deceased, and his habits of drinking at other times, and their consequences, could have no legal efficacy in reducing the crime, of which the defendant stood charged, to justifiable or excusable homicide.”¹

This is correct law, for A. cannot be allowed to attack and kill B. because B. is a cut-throat. But this does not touch the question whether, when B. attacks A., B.’s character as a cut-throat is not justly to be considered by A. in determining whether he is required to take extreme measures in self-defence. The same criticism is applicable to other cases sometimes cited to this point.²

§ 83. In Massachusetts we find decisions which it is more difficult to explain consistently with the line of authorities which have just been given. The first is a celebrated case,³ in which, it must be remembered, there was no evidence that the defendant was acting in self-defence. Mr. Dana, for the defendant, proposed to show “that the deceased was a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter.” In supporting this offer, Mr. Dana announced the “vital question here is whether there was provocation or mutual combat.” The chief justice said:

In Massa-
chusetts
such evi-
dence held
inadmissi-
ble.

¹ State v. Field, 14 Me. 244.

State v. Chandler, 5 La. An. 489;

² State v. Thawley, 4 Harring. 562;
State v. Hogue, 6 Jones (N. C.), 381;

State v. Chopin, 10 La. An. 458.

³ Com. v. York, 7 Law Rep. 497;
9 Met. 93.

“ The general rule unquestionably is, that the general character of neither party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character ; but unless he puts it in issue, it is not so. The government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit if we go beyond the *res gestae*. The only exception is rape. This is partly because the woman is a witness, and partly from policy and necessity, as the only protection of the accused. In the case from Carrington & Payne (*R. v. Smith*), we think the expression probably arose from boasts made by the deceased at the time, and proved as parts of the *res gestae*. The cases from Hawks and from Stewart & Porter stand alone, and are not of such authority as to require us to leave the established course of practice.”

In a subsequent case¹ the line was drawn still more rigidly. A *prima facie* case of self-defence being made out by the defendant, the following proceedings took place :—

“ J. G. Abbot, for the defendant, offered evidence that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive, and brutal man of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm ;” and cited *Quesenberry v. State*, 3 St. & Port. 308; *State v. Tackett*, 1 Hawks, 210; *Oliver v. State*, 17 Ala. 599; *Com. v. Seibert*, Wharton on Homicide, 227.

“ J. H. Clifford (Attorney General) objected to the admissibility of the evidence, and cited *Com. v. York*, 7 Law Reporter, 507, 509.

“ By the Court : The evidence is inadmissible. If such evidence were admitted on behalf of the prisoner, it would be competent for the Commonwealth to show that the deceased was of a mild and peaceable character. Such evidence is too remote and uncertain to have any legitimate bearing on the question at issue. The provocation under which the defendant acted must be judged of by the *res gestae* ; and the evidence must be con-

¹ *Com. v. Hilliard*, 2 Gray, 294 (1854).

finer to the facts and circumstances attending the assault by the deceased upon the defendant."

Four years afterwards the question was revived in a case in which the evidence was that after an altercation the deceased seized the defendant by the throat, the deceased's brother standing by with a shovel, and that the defendant, while choking under the deceased's grip, shot the deceased. The surgeon who made the *post-mortem* proved that the *rigor mortis* was peculiarly severe. The defence then proposed to ask the surgeon: "Was not Jeremiah A. Agin a very strong and muscular man? Did not the *rigor mortis*, being very marked, indicate that Agin was a remarkably powerful man?" But the judge excluded these questions.

The defence then offered to prove that "Agin was an experienced and practised garroter." "The judge excluded this evidence; but allowed the defendant to prove how he was actually seized by the throat, and then to show by experts the anatomical structure of the parts, and the various effects of such seizure and compression on the individual's consciousness, strength, life, and system generally." In the Supreme Court, Bigelow, J., said: "Evidence tending to prove the great muscular vigor and strength of the deceased was clearly incompetent. It did not show provocation, or that the homicidal act was committed in self-defence, or was otherwise excusable or justifiable. The issue was not as to the degree of strength and violence which the deceased was capable of exerting, but how severe and aggravated was the assault which he actually committed on the prisoner. *Com. v. Hilliard*, 2 Gray, 294. For a like reason, evidence that the deceased was in the habit of seizing persons in a peculiar manner by the throat was inadmissible. The defendant was allowed to prove the manner in which the deceased actually assaulted him at the time of the homicide, and this was the only evidence on the point which was relevant or material to the issue."¹ Yet that the defendant's conception, derived from his prior knowledge of the deceased, of the nature of the attack upon him, is a matter for the jury, is conceded in a remarkable homicide case tried in 1868, by Chief Justice Chapman, sitting with Judges Foster, Wells, and Colt. The defence was that the kill-

¹ *Com. v. Mead*, 12 Gray, 168.

ing was in prevention of an attempt by the deceased to commit an unnatural crime on the defendant. The court, under objection, admitted evidence by the defence that on prior occasions, going as far back as nine years, attempts to commit an unnatural crime had been made by the deceased on the defendant.¹

But whatever we may think of the rulings in York's case and Hilliard's case, that in Mead's case cannot be sustained. The prosecution's evidence showed that the defendant was attacked by the deceased. The defendant offered to prove that the deceased was an experienced and practised garroter, leaving it to be inferred that the deceased's grip on the throat was that which garroters apply with such deadly effect. Had this been proved, the defendant would have been excusable in killing the deceased, or at the most, could only have been convicted of manslaughter. But the court refused to hear evidence to show that the deceased was a garroter, and consequently precluded the defendant from offering a legitimate defence. Very different was the course in Selfridge's case, — a case in which, it will be recollected, the defendant, armed with a pistol, shot down at sight a young man of eighteen years, who was armed only with a walking cane. On the trial, the defendant was allowed to call a physician to prove that "in college, defendant was feeble in muscular strength, more than any man of his size in his class;" and was permitted to show that he expected "to be attacked by some bully;" while it was argued that the deceased was a young man in the prime of youthful vigor. Did Judge Parker, who charged the jury, exclude these points from their consideration? So far from doing so, he told the jury that the defendant was excused if the danger was *apparent*, and what was apparent he defined in the following remarkable words: "Whether the firing of the pistol was before or after a blow struck by the deceased, there is a point of more importance for you to settle, and *about which you must make up your mind from all the circumstances proved in the case*; such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, *the muscular debility or vigor of the defendant*, and his power to resist or fly." The jury were also told that the defendant had a right to defend himself from the wrong "*ap-*

¹ Com. v. Andrews, Pamph. Tr. 1869.

parently intended by the deceased." But how "apparently?" The only reply is, that all those circumstances which *appeared* to the defendant, from which he might conclude himself in danger, constitute such apparency.

§ 84. Taking the authorities as a whole, therefore, we may
Summary
of law. hold that it is admissible for the defendant, having first established that he was assailed by the deceased, and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing either (1.) that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or (2.) that he was in such apparent extremity as to make out a case of self-defence; or (3.) that the deceased's purpose in encountering the defendant was deadly. Of course it is admissible for the defendant, in order to excuse a violent repulsion of an assault, to prove that he was so overmatched in strength that he had, when attacked, no other means of escaping from death or great bodily harm. But such evidence can never be received for the purpose of justifying an attack by the defendant on the deceased.

CHAPTER III.

VARIANCE.

I. AGENCY BY WHICH WRONG IS INFLICTED.

Agency by which wrong is inflicted must be substantially proved, § 91.

Material variance is fatal, § 92.

Unknown instruments may be so described, § 93.

II. NAMES OF PERSONS.

Such names must be proved as averred, § 94.

Enough if indictment gives name in popular use, § 95.

Sufficient if name be *idem sonans*, § 96.

Variance between "known" and "unknown" may be fatal, § 97.

Alias dictus allows alternative proof, § 98.

Middle name when distinctive must be proved, § 99.

Variance between "Junior" and "Senior," § 100.

Variance as to description is fatal, § 101.

Proof of acts by agent will sustain averment of acts by principal, § 102.

Corporation name must be proved, though charter need not be produced, § 102 a.

III. TIME AND PLACE.

Time proved may be any day prior to finding, § 103.

Exception as to records and written documents, § 103 a.

Offences of other dates than that proved excluded, § 104.

Offence shut out by statute of limitations cannot be proved, § 105.

Time, when essence of offence, must be proved, § 106.

Place must be proved within jurisdiction of court, § 107.

Proof may be inferential, § 108.

When place is descriptive variance is fatal, § 109.

Venue in homicides, § 110.

Venue in larceny, conspiracy, and treason, § 111.

Venue as to extra-territorial principal, § 112.

Venue in cases of illegal letters and challenges, § 113.

IV. WRITTEN INSTRUMENTS AND RECORDS.

When "tenor" is set out, variance is fatal, § 114.

Accuracy required as to records, § 115.

When legal effect is given, sufficient if proof substantially conforms, § 116.

General designation to be accurate, § 116 a.

When variance is doubtful, case is for jury, § 117.

Lost or unobtainable documents may be proved by parol, § 118.

Loss must be satisfactorily shown, § 119.

Inspection may be ordered, § 120.

V. WORDS SPOKEN.

Words spoken to be substantially proved, § 120 a.

VI. GOODS, NUMBERS, AND SUMS.

Articles described must be substantially proved, § 121.

Coin must be specifically proved, § 122.

Proof must come up to some one article charged, § 123.

Animals must be substantially proved as described, § 124.

Variance in number immaterial, § 125.

Variance as to value immaterial, unless value be descriptive, § 126.

Collective value does not sustain specific, § 127.

VII. NEGATIVE AVERMENTS.

Burden on defendant to prove matter peculiarly in his own knowledge, § 128.

VIII. DIVISIBLE AVERMENTS.

Defendant may be convicted of part of offence charged, § 129.

May be convicted of minor offence, § 130.

Any proved assignment will be sufficient, § 131.

One of several articles in larceny is enough, § 132.

And so of several objects in conspiracy, § 133.

And so of divisible predicates, § 134.

And so of cumulative intents, § 135.

Defendants may be severally convicted, § 136.

Divisibility extended by statute, § 137.

IX. SURPLUSAGE.

Unnecessary words can be rejected, § 138.

Effect of *videlicet*, § 141.

Aggravation and inducement may be discharged, § 142.

Otherwise when allegation is essential, § 143.

Differentia between major and minor offence, § 144.

Allegations of number and quantity may be distributively proved, § 145.

Descriptive averments must be proved, § 146.

Otherwise as to formal language, § 147.

"Feloniously" may be so rejected, § 148.

§ 90. RECENT statutes have done much to modify the common law rulings to the effect that wherever there is a variance in substance between the indictment and the proof, the defendant must be acquitted. As, however, these statutes in few States are the same, and as, even where they exist, the old rulings may be of value as showing how far the statutes operate, it is proposed, in the present chapter, to treat the subject of variance, as it exists at common law, under the following titles : —

I. AGENCY BY WHICH WRONG IS INFLICTED.

§ 91. As a general rule (excluding cases to be noticed where documents are set forth), it is sufficient if the evidence of the instrument by which the wrong is inflicted corresponds in general character and operation with the averments in the indictment.¹ Of this rule an illustration of

¹ R. v. Mackally, 9 Co. 67 a; R. v. Thompson, 1 Mood. C. C. 139; R. v. Warman, 2 C. & K. 195; 1 Den. C. C. 183; R. v. Grounsell, 7 C. & P. 788; R. v. Waters, 7 C. & P. 250; State v. Dame, 11 N. H. 271; Com. v. Macloon, 101 Mass. 1. In Com. v. Fenno, 125 Mass. 387, it was held that the allegation of an assault with a loaded pistol is sufficiently proved by showing that the weapon was discharged within striking distance; it is not limited to an assault with the pistol as a club or bludgeon.

tion is found in a case tried at nisi prius in Philadelphia, by Gibson, C. J. The first count in the indictment charged that the defendant, devising and intending to raise and create riots, &c., with the usual averments, "unlawfully, wickedly, and maliciously incited, encouraged, and endeavored to provoke and instigate divers good citizens of the Commonwealth, whose names are to said inquest unknown," &c., "to assemble and gather together and disturb the peace of the Commonwealth, and to injure and annoy said citizens," &c., "and for that purpose, he, the said defendant, then and there erecting and fixing a certain figure, resembling a man, but commonly called a Paddy, as and for the effigy of St. Patrick, and by these means," &c., "did collect together a large number of citizens, who behaved riotously for a long space of time," &c. The remaining counts were for attempt to produce riot generally, without specifying the means. It appeared from the evidence that sometime between dusk and eleven o'clock, on the 16th of March, a stuffed Paddy, with the accompaniment of a rum bottle and a string of potatoes, was suspended to a tree near the junction of Second Street and German-town road, in the district of Kensington, a neighborhood then inhabited principally by emigrants from Ireland. The figure remained in this position until the next morning, when it was removed, to prevent a disturbance which seemed likely to ensue. The defendant, an innkeeper, residing in that district, was proved by several witnesses to have been in his house during the whole of the evening on which the Paddy was erected; and a great deal of conflicting evidence was produced, which made his agency in the affair very questionable. The averment in the indictment that the figure was intended as an effigy of St. Patrick, and was meant and well calculated to excite the angry feelings of the immediate population, was fully supported. It was proved also beyond contest that the defendant was concerned in the exhibition, on the 18th of March, of a female figure, "commonly called a Shelah," but with several features, besides that of sex, distinguishing it from a Paddy. Some evidence was offered to show, also, that while the exhibition of a *Paddy* was resented as an insult upon the Catholic portion of the Irish, a *Shelah* may have been displayed as a retaliatory emblem, peculiarly irritating to Irish Protestants. A tumult ensued, the insult being

spiritedly resented, and the neighborhood was thrown into confusion thereby for several succeeding weeks. The defendant, it was conceded, was connected with exhibiting the Shelah, though his instrumentality in the Paddy was controverted. The court having instructed the jury that the indictment charged an indictable offence, after a short absence they came back with the inquiry whether the allegation in the indictment that a Paddy had been exhibited was supported by evidence of the exhibition of a Shelah. The court answered in effect, that if the characteristics and object of the Shelah were different from those of the Paddy, the variance was fatal; but that the question of the identity or dissimilarity of the two was for the jury. A verdict of acquittal was subsequently rendered.¹

¹ *Com. v. Haines*, 6 Penn. Law J. 239-241. As to pleading of personal chattels see Whart. Crim. Pl. & Pr. § 208.

As to pleading instrument of death see Whart. Crim. Law, 8th ed. § 519.

In a case in Massachusetts in 1879, upon an indictment, under the statute, charging the defendant with conveying in mortgage incumbered real estate without disclosing the incumbrance, where the allegation is that the grantee "then and there did pay to said Williams for said conveyance a valuable consideration, to wit, the sum of one hundred and forty-eight dollars and ninety-eight cents," and it appears that a suit had been brought by the grantee upon which the defendant was arrested, and that the mortgage in question and a note secured thereby were given to pay the debt sued on and the costs of suit; and upon giving said note and mortgage the defendant was discharged from arrest; it was held that the variance was fatal. *Com. v. Williams*, 127 Mass. 282.

Among other illustrations of the doctrine in the text may be mentioned the following:—

Where an indictment for a conspir-

acy alleged that the defendants, on the 5th of January, 1850, conspired to defraud the F. Insurance Company, by removing and secreting the goods belonging to one of the defendants, and insured by said company, and then pretending that they had been destroyed by fire, and the evidence was that the policy was issued on the 2d of January, 1850; that the goods were removed on the 3d; that the shop from which they were removed was destroyed by fire on the 7th; and that the defendants had no knowledge of any insurance of the goods by the F. Insurance Company until after the fire; it was held that this evidence did not support the allegation in the indictment. *Com. v. Kellogg*, 7 Cush. 473. And an indictment charging the defendant with embezzling money received from contributors, to be paid to an association, is not sustained by proof of a specific trust to pay over the money to the treasurer of the association. *Com. v. O'Keefe*, 121 Mass. 59.

On the other hand, where an indictment charged that the defendant fed a large number of hogs with "slop, fermented grain, the offals and entrails of beasts, and other filth,"

§ 92. "If an offence may be committed in either of various modes, the party charged is entitled to have that mode stated which is proved on the trial; and when one mode is stated and proof of the commission of the offence by a different mode is offered, such evidence is incompetent by reason of variance."¹ And where a statute prescribes that a wound with a particular kind of an instrument shall be punished in a particular way, then the kind of instrument becomes material. "A blow given with the handle of a knife would not be an assault with a knife or a sharp instrument within the statute, any more than would an attempt to discharge a loaded gun, the touch-hole of which was plugged, be an offence under the English statute making it criminal to attempt to discharge a loaded gun at another."² It is otherwise, however, when the wound is produced by an instrument of the same class. Thus an indictment for murder charged that the death of the deceased was caused by a mortal wound on the head, inflicted with a swingle, but it was proved that the death was caused by a blow on the head by a piece of wood, and that the external skin was not broken, but that there was extravasation of blood pressing on the brain, and a collection of blood between the scalp and the brain. The surgeon stated this to be a contused wound, with effusion of blood. It was held by the fifteen judges that the evidence supported the indictment.³ But an indictment charging an exhibition of pictures of "naked girls" is not supported by girls naked above the waist.⁴

by means whereof a nuisance, &c., was created, and the evidence showed that the hogs were fed exclusively on slop; Sergeant, J., held that there was no variance. *Com. v. Vansickle*, Brightly R. 69; 7 Penn. L. J. 82.

¹ *Com. v. Richardson*, 126 Mass. 34.

² *Allen, J., Filkins v. People*, 69 N. Y. 104.

³ *R. v. Warman*, 2 C. & K. 195.

⁴ *Com. v. Dejardin*, 126 Mass. 46.

Of the failure of justice arising from the want of due care in pleading the fatal weapon, a conspicuous

case in England affords an appropriate illustration. *R. v. Bird*, 15 Jur. 193; 5 Cox C. C. 11; 2 Den. C. C. 94; 2 Eng. L. & Eq. 448. See Whart. Crim. Law, 8th ed. §§. 519-20. A little girl in the employ of a man named Bird, was found one day dead in her room. Moans had been heard for several days before, by those in the neighborhood, as of a child gradually fainting under distress and suffering. On examining her body it was found seamed with wounds which had evidently been inflicted from time to time for at least a year back; and

"Un-
known"
instrument
may be so
described.

§ 93. Where an instrument of offence is unknown, it may be so stated, provided the pleader gives as close a description as is consistent with the nature of the case.¹

II. NAMES OF PERSONS.

§ 94. While an error in the name of the defendant can only be taken advantage of by abatement,² an error in the names of the prosecutor, or of third parties, when the name is material, is at common law fatal.³ Thus, if a burglary be alleged to have been committed in the dwelling-house of J. G., and the fact is that it is the dwelling-house of J. S., the defendant must be acquitted for the variance;⁴

Such names must be proved as averred.

there was no sign wanting to show that she had been the victim of steady and malignant cruelty. At once a mob was raised. The defendants had to be escorted to prison by a strong police force, to save them from being torn to pieces on the road. The attention of government was called to the offence by the press in the most vehement terms; and the public authorities appeared to be awake to the importance of the trial, if the character of the counsel employed, and the dignity of the court to which the case was removed, are considered. But the prisoners were acquitted in the teeth of conclusive evidence of guilt, because it appeared from the surgical testimony that the death was beyond doubt caused by a wound in the head, instead of a blow on the back, as the indictment averred. The defendants were then indicted for an assault, the indictment specifying the "wound on the head," discovered on the former trial. To this, the plea of *autrefois acquit* was interposed, upon which, by a vote of eight to six of all the judges of England, judgment, after a protracted and able argument, was entered for the crown. Under the barbarous distinction by which a judgment for the crown on a demurrer or plea of *autrefois acquit*

in misdemeanors is final, the defendants were then sentenced for an offence for which they had never been tried, by a judge who at the time told them that this was "a great hardship." An acquittal may occur, in similar cases, on the first trial, because of reasonable doubt as to the instrument then averred, and then at a second trial, because of reasonable doubt as to the instrument subsequently averred. Hence the importance of the recent amendment statutes.

¹ See Whart. Crim. Law, 8th ed. § 520; *Com. v. Webster*, 5 Cush. 295; *State v. Williams*, 7 Jones N. C. 446. As to lost instruments see *infra*, § 118. If such description is inaccurate the variance is fatal. *Com. v. Dejardin*, 126 Mass. 46.

² Whart. Crim. Pl. & Pr. § 96.

³ 1 East P. C. 514; 2 Leach, 774; 1 Ch. C. L. 217; *R. v. Norton*, R. & R. 509; *R. v. Berriman*, 5 C. & P. 101; *R. v. Wilson*, 1 Den. C. C. 284; 2 Cox C. C. 426; *State v. Bean*, 19 Vt. 530; *Com. v. Gillespie*, 7 S. & R. 469; *State v. Bell*, 65 N. C. 313; *State v. Scurry*, 3 Rich. 68; *State v. Trapp*, 14 Rich. 203. See Whart. Crim. Pl. & Pr. §§ 109 *et seq.*

⁴ *R. v. White*, 1 Leach, 286; *State v. Rushing*, 2 N. & McCord, 560. See, however, *Com. v. Price*, 8 Leigh, 757.

and if a larceny be alleged to have been committed in the house of J. G., and it turn out in evidence to be the house of J. S., the defendant must be acquitted of the stealing in the dwelling-house, and can be found guilty of the simple larceny merely. And so an indictment averring a sale to M. G. is not sustained by proof of a sale to a woman whose name at the sale was M. G., but who before the indictment was found had acquired a new surname by marriage.¹ A draft, also, signed Jos. Johnson, is not admissible under a count stating it to be signed Joseph Johnson, president.² And, generally, variance between the indictment and evidence, in the name of the party injured, will be fatal, and the defendant must be acquitted.³

How the ownership of property is to be averred and proved has been more fully considered in another work.⁴

§ 95. An indictment will not be bad which gives a popular name as distinguished from a proper name; and it will be enough to sustain an averment of a particular name that the party was usually or popularly known by such name, which name he accepted.⁵ Thus, though the

Enough if
indictment
gives name
in popular
use.

¹ *Com. v. Brown*, 2 Gray, 358; *contra*, *R. v. Turner*, 1 Leach, 536.

² *U. S. v. Keen*, 1 McLean, 429.

³ *U. S. v. Howard*, 3 Sumner, 12; *State v. Owens*, 10 Rich. 169; *Timms v. State*, 4 Cold. 138; *Whart. Crim. Pl. & Pr.* § 167.

⁴ *Whart. Crim. Law*, 8th ed. § 932.

⁵ *R. v. Norton*, R. & R. 510; *R. v. Berriman*, 5 C. & P. 601; *Anon.* 6 C. & P. 408; *State v. Bundy*, 64 Me. 507; *Com. v. Trainor*, 123 Mass. 414; *Taylor v. Com.* 20 Grat. 825; *State v. Bell*, 65 N. C. 313.

“In an indictment a boy was called D., and he stated that his right name was D., but that most persons who knew him called him P., and that his mother had married two husbands, the first named P. and the second D., and that he was told by his mother that he was the son of the latter, and that she used always to call him D. *Williams, J.*, after consulting Al-

derson, B., held that the evidence that the boy's mother had always called him D. must be taken to be conclusive as to his name, and that therefore he was rightly described in the indictment. *R. v. Williams*, 7 C. & P. 298.

“On an indictment for the murder of a bastard child, described in the indictment as ‘George Lakeman Clark,’ it appeared he had been christened ‘George Lakeman,’ being the name of his reputed father; that he was called George Lakeman, and not by any other name known to the witnesses; and that the mother called him George Lakeman. There was no evidence that he had obtained or was called by his mother's name of Clark. The judges held that as this child had not obtained his mother's name by reputation, he was improperly called Clark in the indictment, and as there was nothing but the name to identify him

prosecutrix's true name was Susannah, it was held that an indictment calling her Susan, that being her popular name, was good.¹ So where an instrument was signed T. Tupper, and it was averred that the prisoner made it with the intention to defraud Tristram Tupper, the evidence being that Tristram was the name by which the party was known; it was held that there was no variance, and that the count was well framed.²

The name of a corporation must be accurately given.³

Where an indictment for murder undertakes to identify the deceased by his race, the State should make some proof of the descriptive matter.⁴

§ 96. If the name proved be *idem sonans* with that in the indictment, and different in spelling only,⁵ the variance will

in the indictment, the conviction could not be supported. *R. v. Clark*, Russ. & Ry. 358. When an unmarried woman was robbed, and after the offence committed, but before the bill was presented to the grand jury, she married, and the indictment described her by her maiden name, this was held to be sufficient. *R. v. Turner*, 1 Leach, 536." Roscoe's Crim. Ev. 8th ed. p. 86. But *contra* on last point, *Com. v. Brown*, 2 Gray, 358.

¹ *State v. Johnson*, 67 N. C. 58. See *R. v. Norton*, R. & R. 509; *R. v. Berriman*, 5 C. & P. 601; *Anon.* 6 C. & P. 408; *State v. Gardiner*, Wright (Ohio), 392; *State v. Bell*, 65 N. C. 613. As to pleading of middle names and initials see Whart. Crim. Pl. & Pr. §§ 101 *et seq.* As to "junior" and "senior" see *Ibid.* § 108.

² *State v. Jones*, 1 McMull. 236. "Peter Finish" is a variance for "John Peter Finish." *State v. English*, 67 Mo. 127.

³ Whart. Crim. Pl. & Pr. § 110.

On an indictment charging the stealing of the horse of Stephen Harris, the evidence proved that the man whose horse had been stolen was named Harrison. The witness stated that his name of baptism was Har-

rison, though his neighbors sometimes called him Harris; it was held that the owner's name was sufficiently described. *State v. France*, 1 Tenn. 434. On a trial for felony, the only evidence of the prosecutor's Christian name was a statement by a witness that he had seen the prosecutor sign his name to the charge against the prisoners, and to his deposition before the magistrates; that he knew from that the prosecutor's name was Thomas B., but that except from having seen him make his signature, he had no knowledge of his Christian name. It was held that this was admissible and sufficient evidence of the Christian name of the prosecutor. *R. v. Toole*, 40 Eng. L. & Eq. 583; *Dears. & B.* 194. But proof that the accused shot some person of the name of "Rathbun" will not sustain an averment of shooting "William A. Rathbun." *Hardin v. State*, 26 Tex. 113. See *infra*, § 99.

⁴ *Reed v. State*, 16 Ark. 499. *Infra*, § 101.

⁵ *Williams v. Ogle*, 2 Str. 883; *R. v. Wilson*, 2 C. & K. 527; 1 Den. C. C. 284; 2 Cox C. C. 426; *State v. Bean*, 19 Vt. 530; *Point v. State*, 37 Ala. 178; Whart. Crim. Pl. & Pr. § 119.

be immaterial. Thus, "Blankenship" for "Blackenship,"¹ "Havely" for "Haverly,"² "Segrave" for "Sea-^{Sufficient}grave," "M'Nicole" for "M'Nicoll,"³ "Benedetto" ^{if name be}for "Beneditto,"⁴ "Whyneard" for "Winyard," pro- ^{idem}nounced "Winnyard,"⁵ "Charles W. Jeffries" for "C. W. Jeffries,"⁶ "Juli Antoine" for "Jules Antoine,"⁷ "Keen" for "Keene,"⁸ "Deadema" for "Diadema,"⁹ "Autron" for "Autrum" or "Autrim,"¹⁰ "Hutson" for "Hudson,"¹¹ "Droun" for "Drown,"¹² "Thonpson" for "Thompson,"¹³ "Danner" for "Dannaher,"¹⁴ form no variance. A special verdict, finding the name to be Rich'd, when in fact it was Richard, is not fatally defective.¹⁵ But it has been decided that "M'Cann" and "M'Carn,"¹⁶ "Shakespeare" and "Shakepeare,"¹⁷ "Chambles" and "Chambless,"¹⁸ "Sedbetter" and "Ledbetter,"¹⁹ "Dougal McInnis" and "Dougal McGinnis,"²⁰ "Tabart" and "Tarbart,"²¹ "Burrall" and "Burrill,"²² "Shutliff" and "Shirtliff,"²³ "Prison" and "Brisson,"²⁴ "Donnel" and "Donald,"²⁵ "Melvin" and "Melville,"²⁶ "Ratharine" and "Catharine,"²⁷ "Senderfer" and "Sensenderf,"²⁸ "Della Weaver" for "Dellia Weaver,"²⁹ are not the same in sound.³⁰ "McCoskey" is a

¹ State v. Blankenship, 21 Mo. 504.

² Ibid. 498, *sed quære*.

³ R. v. Wilson, 2 C. & K. 527; 1 Den. C. C. 284.

⁴ Ahitbol v. Benedetto, 2 Taunt. 401.

⁵ R. v. Foster, R. & R. 412.

⁶ State v. Bibb, 68 Mo. 286; but see Com. v. Kearns, 1 Va. Cas. 109. *Infra*, § 99.

⁷ Point v. State, 1 Ala. (Sel. Cas.) 54; S. C., 37 Ala. 148.

⁸ Com. v. Riley, Thach. C. C. 67.

⁹ State v. Patterson, 2 Ired. 346.

¹⁰ State v. Scurry, 3 Rich. 68.

¹¹ State v. Hutson, 15 Mo. 512; Chapman v. State, 18 Ga. 736.

¹² Com. v. Woods, 10 Gray, 477.

¹³ State v. Wheeler, 85 Vt. 261.

¹⁴ Graham v. People, 58 Ill. 160.

¹⁵ Huffman v. Com. 6 Rand. (Va.) 685.

¹⁶ R. v. Tannett, R. & R. 351.

¹⁷ R. v. Shakespeare, 10 East, 88.

¹⁸ Ward v. State, 28 Ala. 53.

¹⁹ Zellers v. State, 7 Ind. 659.

²⁰ Barnes v. People, 18 Ill. 52.

²¹ Bingham v. Dickie, 5 Taunt. 814.

²² Com. v. Gillespie, 7 S. & R. 469.

²³ 1 Chitty, 216.

²⁴ Addison, 141.

²⁵ Donnel v. U. S. 1 Morris, 141. See McDonald v. People, 47 Ill. 533.

²⁶ State v. Curran, 18 Mo. 320.

²⁷ Swails v. State, 7 Blackf. 324.

²⁸ Com. v. Bowers, 3 Brewst. 350.

²⁹ Vance v. State, 65 Ind. 460.

³⁰ See further Whart. Cr. Pl. & Pr. § 119. Compare Moynahan v. People, 3 Col. 367.

That giving an initial, in the setting forth of a Christian name, when tenor is attempted, is fatal, see Com. v. Kearns, 1 Va. Cas. 109; Murphy v. State, 6 Tex. Ap. 554; though compare State v. Bibb, 68 Mo. 286.

variance from either "McKaskey," or "McKlaskey," or "McKloskey."¹

What is *idem sonans* is for the jury on an issue of fact,² though it is otherwise on demurrer.³ What the name in the indictment is, when a question of fact, is for the jury.⁴

In another work it will be seen that the name of the defendant should be specifically given,⁵ that the omission of the surname is fatal,⁶ that mistake in this respect may be met by plea in abatement,⁷ that middle names are to be given when essential,⁸ that initials are requisite when used by the party,⁹ that an unknown party may be proximately described,¹⁰ that at common law addition is necessary,¹¹ that a wrong addition is to be met by plea in abatement,¹² that "junior" is to be used when the party is known as such. As to third parties, it will be seen that the name only need be given,¹³ that corporate title must be special,¹⁴ that an immaterial misnomer may be rejected,¹⁵ that it is sufficient if description is substantially correct,¹⁶ that the name may be given by initials,¹⁷ but that a material variance is fatal.¹⁸

§ 97. When a third person is described as "a person to the grand jurors unknown," and it turns out that he was known to the grand jurors, the variance is fatal.¹⁹ It is otherwise when the name does not become known until after indictment found;²⁰ and the burden is on the de-

¹ Black v. State, 57 Ind. 109.

² R. v. Davis, 2 Den. C. C. 231; Com. v. Donovan, 13 Allen, 571; Girous v. State, 29 Ind. 93; Lawrence v. State, 59 Ala. 61; Cotton v. State, 4 Tex. 260.

³ State v. Havelly, 21 Mo. 498.

⁴ Infra, § 117.

⁵ Whart. Cr. Pl. & Pr. § 96.

⁶ Ibid. § 97.

⁷ Ibid. § 98.

⁸ Ibid. § 101.

⁹ Ibid. § 102.

¹⁰ Ibid. § 104.

¹¹ Ibid. § 105.

¹² Ibid. § 106.

¹³ Ibid. § 109.

¹⁴ Ibid. § 110.

¹⁵ Ibid. § 114.

¹⁶ Ibid. § 115.

¹⁷ Ibid. § 117.

¹⁸ Ibid. § 116.

¹⁹ 2 East P. C. 561, 787; 3 Camp. 265, note; 2 Hawk. c. 25, s. 71; 2 Leach, 578; R. v. Robinson, 1 Holt, 595; R. v. Stroud, 2 Mood. C. C. 270; R. v. Bliss, 8 C. & P. 773; Com. v. Tomson, 2 Cush. 551; Com. v. Hill, 11 Cush. 137; State v. Wilson, 30 Conn. 500; White v. People, 32 N. Y. 465; 55 Barb. 606; Blodget v. State, 3 Ind. 403; Moore v. State, 65 Ind. 213; Barkman v. State, 13 Ark. 703; Reed v. State, 16 Ark. 499; Jorasco v. State, 6 Tex. Ap. 283; Whart. Cr. Pl. & Pr. §§ 111-13.

²⁰ R. v. Campbell, 1 C. & K. 82; R. v. Smith, 1 Mood. C. C. 402; Com.

fendant to show that the grand jury, at the particular time of finding, knew the name.¹ Knowledge of the name transpiring in another case before the same grand jury does not imply knowledge in the particular case in which the allegation of unknown is made.²

v. Hendrie, 2 Gray, 503; *Com. v. Hill*, 11 Cush. 137; *State v. Haddock*, 2 Hayw. 162; *White v. People*, 32 N. Y. 485; *Cheek v. State*, 38 Ala. 227; *Hays v. State*, 13 Mo. 246; *State v. Bryant*, 14 Mo. 340; *Reed v. State*, 16 Ark. 499. See *Whart. Cr. Pl. & Pr.* § 113. As to owners in larceny see *Whart. Crim. Law*, 8th ed. § 949.

¹ *R. v. Bush*, R. & R. 372; *Com. v. Tomson*, 2 Cush. 551; *Com. v. Hill*, 11 Cush. 137; *Com. v. Gallagher*, 126 Mass. 54; *Blodget v. State*, 3 Ind. 403. In conspiracy it would seem sufficient if any co-conspirators were unknown. *Whart. Crim. Law*, 8th ed. § 1393.

In Massachusetts it is held that the allegation is sufficient, though the grand jury might have found out the name by examining the witness called before them. *Com. v. Stoddard*, 9 Allen, 880. *Aliter*, in Indiana, *Blodget v. State*, 3 Ind. 403.

² *R. v. Bush*, R. & R. 372.

On an indictment for adultery containing two counts, in one of which the offence is charged to have been committed with E. B., and in the other with a woman whose name was not known, evidence being introduced tending to show that the person of the woman was known, and that her name was E. B., it was held, that if the jury doubted, upon the evidence, whether the true name of the woman was E. B., they might find the defendant guilty on the second count. *Com. v. Tomson*, 2 Cush. 551.

When the allegation of the indictment is that a third person was unknown, it is enough if it appear in

proof that such third person was unknown when indictment was found, though he became known afterwards. *Com. v. Hendrie*, 2 Gray, 503; *White v. People*, 32 N. Y. 465; *Cheek v. State*, 38 Ala. 227. See *Com. v. Blood*, 4 Gray, 31. But a complaint for unlawfully selling intoxicating liquor to a person unknown, on which the defendant is convicted before a justice of the peace, or police court, on proof of a sale to one person, is not supported, on the trial on appeal, by proof of a sale to a different person. *Zellers v. State*, 7 Ind. 659.

“Where the property was laid in one count as belonging to certain persons named, and in another as belonging to persons unknown, and the prosecutor failed to provide the Christian names of the persons mentioned in the first count; it was held by *Richards, C. B.*, that he could not resort to the second count; and the prisoner was acquitted. *R. v. Robinson*, Holt N. P. C. 595. An indictment against the prisoner, as accessory before the fact to a larceny, charged that a *certain person to the jurors unknown* feloniously stole, &c., and that the prisoner incited the said person unknown to commit the said felony. The grand jury had found the bill upon the evidence of one Charles Iles, who confessed that he had stolen the property, and it was proposed to call him to establish the guilt of the prisoner, but *Le Blanc, J.*, interposed and directed an acquittal. He said he considered the indictment wrong, in stating that the property had been stolen by a person unknown, and

Alias dictus
allows al-
ternative
proof.

§ 98. When the name either of the defendant or of a third party is laid with an *alias dictus* (e. g. Richard Witson, otherwise called Richard Layer), proof of either name will be enough.¹

Middle
names
when dis-
tinctive
must be
proved.

§ 99. Much dispute exists as to whether a middle name is part of a name, and there are rulings that its omission is no variance.² But where a man is popularly known by his middle name, it would seem that he should be described by such in the indictment.³ On the other hand, where he is commonly known by his first name, omission of the middle name is not fatal;⁴ but the omission of the first name, giving only the middle name, would be error.⁵ If a middle name be given, it should be proved as laid.⁶ But the real question is, what did the defendant call himself, and permit himself to be called? By this name he is to be indicted.⁷ If he calls himself by initials, and signs his name by initials, by initials he may be described in an indictment.⁸

asked how the witness, who was the principal felon, could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. *R. v. Walker*, 3 Campb. 264. See also *R. v. Blick*, 4 C. & P. 377. But where an indictment stated that a certain person to the jurors unknown burglariously entered the house of H. W., and stole a silver cream jug, &c., which the prisoner feloniously received, and it appeared that amongst the records of indictments returned by the same grand jury there was one charging Henry Moreton as principal in the burglary, and the prisoner as accessory in receiving the cream jug; that H. W.'s house had been entered only once, and that she had lost only one cream jug, and that she had preferred two indictments; it was held by the judges, that the prisoner was properly convicted, the finding of the grand jury on the bill, imputing the principal felony to H. M., being no objection to the other indictment. *R.*

v. Bush, Russ. & Ry. 372. See also *R. v. Casper*, Moo. C. C. 101." Roscoe's Cr. Ev. 87.

¹ *State v. Graham*, 15 Rich. 310. See 1 *Ld. Raym.* 562; *Willes*, 554; *Kennedy v. People*, 39 N. Y. 245; *State v. Gardiner*, *Wright* (Ohio), 392.

² *Wh. Cr. Pl. & Pr.* § 101; *People v. Cook*, 14 Barb. 259; *State v. Williams*, 20 Iowa, 98; *State v. Manning*, 14 Tex. 402. See *West v. State*, 48 Ind. 483. As to whether an initial can be a name see *Wh. Cr. Pl. & Pr.* §§ 101-2.

³ *Com. v. Perkins*, 1 Pick. 388; *Com. v. Blood*, 4 Gray, 31.

⁴ *Miller v. People*, 39 Ill. 457; *People v. Lockwood*, 6 Cal. 205.

⁵ *State v. Hughes*, 1 Swan, 266; *State v. Martin*, 10 Mo. 391. See *Hardin v. State*, 26 Tex. 113. See *Wh. Cr. Pl. & Pr.* § 101.

⁶ *Price v. State*, 19 Ohio, 423; *States v. Hughes*, 1 Swan, 266.

⁷ *Wh. Cr. Pl. & Pr.* § 101.

⁸ *Tweedy v. Jarvis*, 27 Conn. 62;

§ 100. When the term "junior" is so attached to a person's name that he is known by it distinctively, it has been held that it is a fatal variance should the indictment describe him without the "junior."¹ But the better opinion is that "junior" is not part of a name, unless made so by the party himself, and adopted by the community.²

Variance between "junior" and "senior."

§ 101. A false description of a party may produce a variance. Thus where a woman (the wife of an alleged bigamous party) was averred to be a "widow," when the proof was that she was a single woman, this proof was held not to sustain the indictment.³ It is otherwise when the false description is as to the defendant's name, in which case the defect must be met by plea in abatement.⁴

Variance as to description fatal.

§ 102. Whenever the legal effect of an agent's acts is the same as it would be if the principal acted in person, — in other words, whenever the agent is the extension of the principal, — evidence that a particular thing was done by the agent operating for the principal will sustain an averment of acts by the principal.⁵ Hence misdemeanors committed by an agent under the principal's direc-

Proof of acts by an agent will sustain averment of acts by principal.

Vandermark v. People, 47 Ill. 122; *State v. Bell*, 65 N. C. 313; *State v. Anderson*, 3 Rich. 172; *State v. Black*, 31 Tex. 560; *Wh. Cr. Pl. & Pr.* § 402.

¹ *State v. Vittum*, 9 N. H. 519. See *Singleton v. Johnson*, 9 M. & W. 67.

² *R. v. Peace*, 3 B. & Ald. 579; *Hodgson's case*, 1 Lew. C. C. 236; *State v. Grant*, 22 Me. 171; *State v. Weare*, 38 N. H. 314; *Allen v. Taylor*, 26 Vt. 599; *Com. v. Perkins*, 1 Pick. 388; *People v. Cook*, 14 Barb. 259; *Thompson v. Lee*, 12 Ill. 314; *McKay v. State*, 8 Tex. 376. See *Whart. Crim. Pl. & Pr.* § 108. In *Com. v. Parmenter*, 101 Mass. 211, it was held that W. R. Jr. might be indicted as W. R. "the second of that name."

³ *R. v. Deeley*, 1 Mood. C. C. 303;

4 C. & P. 579. See *Reed v. State*, 16 Ark. 499, applying same rule to false description of race. See, however, *U. S. v. Howard*, 3 Sumner, 12; *Com. v. Hunt*, 4 Pick. 252. *Infra*, § 146.

⁴ *Com. v. Lewis*, 1 Met. 151; *Whart. Crim. Pl. & Pr.* § 106. *Infra*, § 146.

⁵ *Infra*, § 112; *Whart. Crim. Law*, 8th ed. §§ 221, 522; *R. v. Gutch*, M. & M. 437; *State v. Neal*, 7 Foster, 131; *Com. v. Nichols*, 10 Met. 259; *Com. v. Bagley*, 7 Pick. 270; *Com. v. Call*, 21 Pick. 515; *Com. v. Chapman*, 11 Cush. 422; *Com. v. Park*, 1 Gray, 553; *Com. v. Gillespie*, 7 S. & R. 469; *Stoughton v. State*, 2 Oh. St. 562; *State v. Mathis*, 1 Hill (S. C.), 37; *Brister v. State*, 26 Ala. 107; *Britain v. State*, 3 Humph. 203. That an agent's declarations are imputable to a principal see *infra*, § 695.

tions may be averred to have been committed by the principal ;¹ and a homicide alleged to be committed by A. is sustained by proof of a killing by B. under A.'s directions and immediate control.² To the same effect are cases where it is held that an indictment averring false pretences made to, or money obtained from, a principal, is supported by evidence that the pretences were made to, or money obtained from, an agent.³ And where the indictment charges A. as principal and B. as abetting, it is no variance if the evidence exhibits B. as principal and A. as abetting.⁴ On the same reasoning, an averment of an intent to defraud A. B. is sustained by proof of an intent to defraud a firm of which A. B. is a member.⁵

Corpora-
tion name
must be
proved
though
charter
need not
be pro-
duced.

§ 102 *a*. The name of a corporation must be correctly given and proved as laid.⁶ It has been held that proof of the existence of the corporation is *prima facie* proof of incorporation.⁷ And this is clearly the case where the court takes judicial notice of the charter.⁸

III. TIME AND PLACE.

§ 103. The time of the commission of an offence laid in the indictment is ordinarily not material, and does not confine the proofs within the limits of that period ; the indictment will be satisfied by proof of the offence on any day anterior to the finding.⁹

Time
proved
may be
any day
prior to
finding.

¹ Ibid.

² Whart. Crim. Law, 8th ed. § 522.

³ Ibid.; State v. Curran, 18 Mo. 320.

⁴ Fost. 551; 1 East P. C. 350; R. v. Mackally, 9 Coke, 453; Plowden, 983; R. v. Culkins, 5 C. & P. 521; Com. v. Chapman, 11 Cush. 422; State v. Mairs, Coxe, 453; State v. Fley, 2 Rice's Dig. 100; State v. Jenkins, 14 Rich. 215; Whart. Crim. Law, 8th ed. §§ 218, 522.

⁵ State v. Hastings, 53 N. H. 452; People v. Curling, 1 Johns. 320; Stoughton v. State, 2 Ohio St. 562.

⁶ U. S. v. Hinman, 1 Bald. 292.

⁷ Calkins v. State, 18 Ohio St. 336.

⁸ Whart. on Ev. §§ 294, 314; Whart. Crim. Law, 8th ed. § 716.

⁹ Whart. Crim. Pl. & Pr. § 120; 1 Ch. C. L. 557; R. v. Aylett, 1 T. R. 63; R. v. Holland, 5 T. R. 607; R. v. Haynes, 4 M. & S. 214; R. v. Brown, M. & M. 160; U. S. v. McCormick, 4 Cranch C. C. 104; Johnson v. U. S. 3 McLean, 89; U. S. v. Riley, 5 Blatch. 204; State v. Hanson, 39 Me. 337; State v. Munger, 15 Vt. 291; Com. v. Kelly, 10 Cush. 69; Com. v. Dillane, 1 Gray, 483; Com. v. Carroll, 15 Gray, 409; Com. v. Campbell, 103 Mass. 436; Com. v. Dacey, 107 Mass. 206; State v. Munson, 40 Conn. 475; People v. Van Santvoord, 9 Cow. 660; Jacobs v. Com. 5 S. & R. 316; State v. Porter, 2 Rich. 145; State v. Ball, 49 Iowa, 440; State v. Woodman,

§ 103 *a*. Several exceptions, however, are to be noticed. Wherever deeds, bills of exchange, bank notes, or promissory notes of any kind whatever, are set forth, it is essential that the *date*, if stated, should correspond with the evidence.¹ Where, also, any time stated in an indictment is to be proved by a matter of record, a variance will be fatal.² Thus, in an indictment for perjury, the day on which the perjury was committed must be truly laid.³

Exception as to records and written documents.

§ 104. Where a specific offence is charged, the indictment cannot be sustained by proof of a second offence even on the same day. This results from the general principles that evidence of offences collateral to that in the indictment cannot be received, and that the issue should be single.⁴ And should it happen that the evidence discloses several successive offences, any one of which could sustain a conviction, the prosecution (unless the charge be for a continuous offence) must elect the offence which it will pursue; and when this is done, proof of the other offences will be excluded, under the limitations above expressed.⁵

Offences of other dates than that proved excluded.

³ Hawks, 384; *State v. Newsom*, 2 Jones (N. C.), 173; *Medlock v. State*, 18 Ark. 363; *Emporia v. Volmar*, 12 Kans. 622; *People v. Littlefield*, 5 Cal. 355.

Mr. Amos (*Great Oyer, &c.* 247) animadvert with great sharpness on that "prudery" which makes the law strain at the variance of a letter in a proper name, and yet swallows what is a great deal more material, a variance in a date. To this the only answer is, that the "prudishness," bad as it is, would be much worse, if a man was to be acquitted, if the days of the month, or even the month of the year — the most volatile of all items of recollection — escaped the witness's memory. It is said, however, that while under an indictment for the single commission of a crime, time is not a material allegation, the prosecution must select some one commission of the alleged crime, before evidence

is produced, which then becomes the offence charged and the only one to be tried. *People v. Jenness*, 5 Mich. 305.

¹ Whart. Crim. Pl. & Pr. § 136.

² Whart. Crim. Pl. & Pr. § 135; Archbold C. P. 9th ed. 90; *Green v. Rennett*, 1 T. R. 656; *Pope v. Foster*, 4 T. R. 590; *Woodford v. Ashley*, 11 East, 508; *Rastall v. Stratton*, 1 H. Bl. 49; 2 Saund. 291; *U. S. v. McNeal*, 1 Gall. 387.

³ *U. S. v. McNeal*, 1 Gall. 387; *U. S. v. Bowman*, 2 Wash. C. C. 328; *Com. v. Monahan*, 9 Gray, 116. *Infra*, § 115.

⁴ *Com. v. Dean*, 109 Mass. 349. See *Com. v. Briggs*, 11 Met. 573; *Com. v. Elwell*, 1 Gray, 463; *Com. v. Adams*, 4 Gray, 27.

⁵ *Supra*, §§ 331 *et seq.* See, generally, as to election in such cases, Whart. Cr. Pl. & Pr. §§ 293 *et seq.*

In a Massachusetts case, in which there were five counts for larceny, but

Offence
shut out
by statute
of limita-
tions can-
not be
proved.

Time,
when the
essence of
an offence,
must be
proved.
"Hour."

§ 105. An offence cannot be put in evidence which is sheltered from prosecution by the statute of limitations, even though the indictment should aver the offence to be within the period allowed by law.¹

§ 106. When it is of the essence of an offence that it should have been committed in a particular time of the day (*e. g.* in burglary), the allegation to this effect in the indictment should be proved as laid; though it is no variance if the day proved be not the day laid if the averment of the time of day be sustained.² Whether the allegation as to the time of the day is sustained is for the jury.³ The same distinction is applicable to cases where the gist of the offence is that it was committed on *Sunday*. In such case the offence must be proved to have been committed on Sunday. But the proof of any Sunday, before the finding of the bill and within the statute of limitations, is sufficient.⁴

In *murder*, the death must be proved to have taken place within a year and a day from the time at which the stroke is proved to have been given.⁵

If dates be on their face inconsistent and repugnant, this, when the dates are essential, vitiates the indictment.⁶

the evidence did not fix any particular occasion of larceny, the judge instructed the jury that "if they found from the evidence, including the confession of the defendant, that he had, on five different occasions, within the period covered by the several counts, stolen articles described in the several counts of the indictment respectively, they would be authorized to render a verdict of guilty, and not otherwise." It was held, that whether there were five distinct larcenies proved was a question of fact for the jury, and was properly submitted to them. *Com. v. Sego*, 125 Mass. 210.

¹ *R. v. Phillips*, R. & R. 369; *R. v. Brown*, M. & M. 160; *U. S. v. Watkins*, 3 Cranch C. C. 441; *U. S. v. White*, 3 Cranch C. C. 73; *State v. Hobbs*, 39 Me. 212; *State v. Robinson*, 9 Foster, 274; *State v. J. P. 1 Tyler*,

283; *Com. v. Ruffner*, 28 Penn. St. 259; *Hatwood v. State*, 18 Ind. 492; *State v. McGrath*, 19 Mo. 678. As to averments proper in such cases see *Wh. Cr. Pl. & Pr.* §§ 137, 318.

² *Whart. Crim. Law*, 8th ed. § 806; *People v. Burgess*, 35 Cal. 115.

³ *State v. Leaden*, 35 Conn. 515; *People v. Schryver*, 42 N. Y. 1; *Waters v. State*, 53 Ga. 567; *People v. Burgess*, 35 Cal. 115.

⁴ *R. v. Trehearne*, 1 Mood. C. C. 298; *Com. v. Harrison*, 11 Gray, 308; *People v. Ball*, 42 Barb. 324; *State v. Drake*, 64 N. C. 589; *McGowan v. Com.* 2 Metc. (Ky.) 3; *State v. Bruncker*, 46 Conn. ; *State v. Eskridge*, 1 Swan, 413; *Wh. Cr. Pl. & Pr.* § 12; *Frazier v. State*, 5 Mo. 536.

⁵ 2 Hawk. c. 23, s. 90; *Archb. P. C.* 9th ed. 90, a; *Whart. Crim. Law*, 8th ed. §§ 312, 537.

⁶ *Wh. Cr. Pl. & Pr.* § 134.

Time is in all cases to be inferentially shown.¹

§ 107. We have discussed, in another volume, the important question whether it is necessary, to give jurisdiction of an offence, that the party charged at the time of committing it should have been within the jurisdiction of the court.² It is here sufficient to say, generally, that while the place of the offence must be shown to be within the jurisdiction, there is no necessity to prove that the facts given in evidence occurred in the parish or place therein alleged; it is sufficient to prove that they occurred within the county or other extent of the court's jurisdiction.³ If this be not shown the defendant must be acquitted.⁴

Place must be shown to be within jurisdiction of court.

§ 108. It is not necessary that witnesses should be produced to testify that the offence was committed in the place charged. It is enough if the proof be inferential.⁵

Proof may be inferential.

Thus the finding of a human body, with marks upon it of injuries sufficient to cause death, in a river in the heart of a county, in such a situation and condition as to show that it must have been thrown there by the hand of man and not borne there by the force of the stream or current, is enough to warrant the jury in finding that the homicide was committed in that county.⁶ Again, on a trial for forgery, if an instrument on its face purports to be made in Charleston, S. C., and it is proved that the prisoner at its date was there, and had the same in his possession, this is sufficient evidence to show that it was made there.⁷ But where a forged bill of exchange was found upon J. S., who resided in Wiltshire, and had resided there about a year under a false name, but the bill bore a date more than two years prior to its being found upon him, and at a time when he lived in

¹ Supra, § 11; *Greenwood v. State*, 54 Ind. 250.

² Whart. Crim. Law, 8th ed. § 278, note.

³ 2 Hawk. c. 25, s. 84; 2 Russ. on Crimes, 799.

⁴ *People v. Barrett*, 1 Johns. 66; *Larkin v. People*, 61 Barb. 226; *State v. Jones*, 4 Halst. 357; *Stacey v. State*, 58 Ind. 514; *People v. Bevans*, 52 Cal. 470; *State v. Burns*, 48 Mo. 438.

⁵ *Com. v. Costley*, 118 Mass. 3; *State v. Calvin*, Charlton, 152; *Moody v. State*, 7 Blackf. 424; *Cluck v. State*, 40 Ind. 268; *State v. Dent*, 6 Rich. N. S. 383; *Beavers v. State*, 58 Ind. 530; but see *Bell v. State*, 1 Tex. Ap. 81; *Moore v. State*, 22 Tex. Ap. 351.

⁶ *Com. v. Costley*, 118 Mass. 2.

⁷ *State v. Jones*, 1 McMull. 236.

Somersetshire; on an indictment against him for forgery of the bill in Wiltshire, this was ruled not to be sufficient evidence of the commission of the offence in that county.¹ And where a deed charged to be forged, and purporting to be made in the county of Harris, represented the grantor to be a resident of Galveston, and the grantee (the indicted forger), of the county of Milan, and there was no evidence of the residence of the latter elsewhere, the court held that the evidence given was not sufficient to authorize the jury to find that the forgery was committed in Anderson County, where the venue was laid.²

In an English case decided in 1878, the evidence was that it was the duty of the defendant, a commercial traveller, to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. The defendant, on the 1st and 2d of March, 1878, collected at Newark two sums of money which he did not remit or account for till the first week in April, when one of his employers went to Grantham where the defendant resided, saw him, and taxed him with receiving moneys and not accounting to them for them. The defendant then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the defendant returned to Grantham on either of the days, or at what time of the respective days he received the two sums of money. It was held, on a case reserved, that there was no evidence of any embezzlement within the borough of Grantham.³

§ 109. Supposing a minor locality is superfluously averred, if there be no such minor locality as that stated it is immaterial,⁴ and details, unnecessary to the description of the offence, may be rejected as surplusage.⁵ Where, however, the place is stated as matter of local description and not as venue, it becomes necessary to prove it as laid.⁶ Thus, for instance, on an indictment for stealing in

When
place is
stated as
matter of
description,
variance is
fatal.

¹ R. v. Crocker, 2 New Rep. 87.
See R. & R. 99, n.

² Henderson v. State, 14 Tex. 503.

³ R. v. Treadgold, 39 L. T. (N. S.) 291.

⁴ R. v. Woodward, 1 Mood. C. C. 323.

⁵ Wh. Cr. Pl. & Pr. § 145; 2 Hale, 179, 244, 245; 1 East P. C. 125; Com. v. Gillon, 2 Allen, 502; Heikes v. Com. 26 Penn. St. 531; Carlisle v. State, 32 Ind. 55.

⁶ R. v. Cranage, Salk. 385; 2 Stark. Ev. 1571; R. v. Owen, 1 Mood. C. C.

the dwelling-house, &c., for burglary, for forcible entry, or the like, if there be a material variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted.¹ In an indictment, also, for not repairing a highway, the situation of the highway is material.² In an action, also, for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water called T., the error is material,³ and this rule is generally applicable to indictments for nuisances.⁴ And in an indictment for arson, where the tenement was averred to be in the sixth ward of the city of New York, whereas it was in the fifth, the indictment was held bad.⁵ But where an indictment for larceny charged that the offence was committed in a vessel in the *first* ward in the city of New York, and it appeared that the vessel was lying in the river at a wharf of the *third* ward, it was held not to be a material variance, the local description not being of the essence of the offence.⁶

In another volume it will be shown that it is enough to lay the venue within the jurisdiction of the court;⁷ that when the act is by an agent the principal is to be charged as doing it in the place of commission;⁸ that when a county is divided the trial is to be in the court of the *locus delicti*,⁹ that when a county includes several jurisdictions the jurisdiction must be specified,¹⁰ that "county aforesaid" is generally enough,¹¹ that title, when changed by legislation, must be followed,¹² and that omission of the venue is fatal.¹³

118; *State v. Cotton*, 4 Foster, 143; *Moore v. State*, 12 Oh. St. 389; *State v. Crogan*, 8 Iowa, 528; *Chute v. State*, 19 Minn. 271; *Grimme v. Com.* 5 B. Mon. 263. *Infra*, § 146; Whart. Cr. Pl. & Pr. § 145.

¹ Archb. C. P. 9th ed. 91; *Wilson v. Gilbert*, 2 B. & P. 281; *R. v. Ridley*, R. & R. 515; *State v. Cotton*, 4 Foster, 143; *Grimme v. Com.* 5 B. Mon. 263.

² 2 Stark. C. P. 698.

³ *Shaw v. Wrigley*, 2 East, 500.

⁴ *Wertz v. State*, 42 Ind. 166.

⁵ *People v. Slater*, 5 Hill (N. Y.), 401.

⁶ *People v. Honeyman*, 3 Denio, 121.

⁷ Whart. Cr. Pl. & Pr. § 139.

⁸ *Ibid.* § 140.

⁹ *Ibid.* § 141.

¹⁰ *Ibid.* § 142.

¹¹ *Ibid.* § 146.

¹² *Ibid.* § 147.

¹³ *Ibid.* § 150.

§ 110. At common law, an indictment for murder cannot be sustained where the blow was extra-territorial, though the death was intra-territorial.¹ After some fluctuation of opinion, it may be now considered settled that a statute is constitutional which confers jurisdiction on the sovereign of the place of death.²

§ 111. In conspiracy, an indictment averring the offence to have been in a particular county or State may be sustained by proof of an overt act in such county or State.³
 In conspiracy and larceny. In larceny, at common law, the county where the stolen goods are brought has jurisdiction, if the goods were stolen in the same country, though not when the goods were stolen in another country.⁴ As between the several States of the American Union, the State where the thief brings the property has been held to have jurisdiction at common law;⁵ though this has been disputed in several States.⁶ It has even been held in Maine and Vermont that an indictment may be sustained in the State where the goods were brought, though they were stolen in Canada.⁷

¹ See Co. Lit. 74 *b*; 1 Hale, 426, 500; 2 Hale, 20, 163; R. v. Lewis, Dears. & B. 182; 7 Cox C. C. 277; U. S. v. McGill, 4 Dall. 427; S. C., 1 Wash. C. C. 463; U. S. v. Armstrong, 2 Curtis C. C. 446; State v. Carter, 3 Dutch. 500.

² Com. v. Macloon, 101 Mass. 1; Tyler v. People, 8 Mich. 326. See State v. Wyckoff, 2 Vroom, 68; Riley v. State, 9 Humph. 646; Whart. Crim. Law, 8th ed. § 292.

³ R. v. Ferguson, 2 Stark. (N. P.) 489; Com. v. Corlies, 3 Brewst. 575; 8 Phil. R. 450; Bloomer v. State, 48 Md. 321; Whart. Crim. Law, 8th ed. §§ 287, 1397, where the cases are collected.

⁴ Whart. Crim. Law, 8th ed. §§ 291, 930; Butler's case, 13 Co. 55; 3 Inst. 113; R. v. Peel, 9 Cox C. C. 220; Com. v. Uprichard, 3 Gray, 434.

⁵ State v. Underwood, 49 Me. 181; State v. Bartlett, 11 Vt. 650; Com. v.

Andrews, 2 Mass. 14; Com. v. Holder, 9 Gray, 7; State v. Ellis, 3 Conn. 186; Cummings v. State, 1 Har. & J. 340; Hamilton v. State, 11 Ohio, 435; Myers v. People, 26 Ill. 173; People v. Williams, 24 Mich. 156; State v. Bennett, 14 Iowa, 479; Ferrill v. Com. 1 Duvall, 153; Watson v. State, 36 Miss. 593; State v. Newman, 9 Nev. 48.

⁶ People v. Gardner, 2 Johns. 477; State v. Le Blanche, 2 Vroom, 82; Simmons v. Com. 5 Binn. 619; Beal v. State, 15 Ind. 378; State v. Brown, 1 Hayw. 100; State v. Rennels, 14 La. An. 278; People v. Loughridge, 1 Neb. 11. See Whart. Crim. Law, 8th ed. §§ 291, 930. The constitutionality of statutes conferring the jurisdiction has been affirmed in Simmons v. Com. supra; Beal v. State, supra; and Simpson v. State, 4 Humph. 461.

⁷ State v. Underwood, 49 Me. 181;

In treason, the defendants may be indicted in any county where an overt act was committed.¹

§ 112. We have already seen that an averment that an act was committed by a principal may be sustained by proof that the act was committed by an agent.² From this it follows that a principal who extra-territorially directs an offence is liable intra-territorially for the acts of his agent in its commission.³ A co-conspirator, also, as we have just seen, is liable in the place of the overt act, though absent at the time.⁴

§ 113. Where threatening letters, or libels, or forged instruments are written in one county, and sent by mail into another, and there received by the person to whom addressed, it has been ruled that an indictment therefor should be found in the latter county,⁵ though an indictment lies also in the county where the letter was mailed.⁶

When the prisoner, in a begging letter, which contained false pretences, and was addressed to the prosecutor, who resided in Middlesex, requested him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the prisoner's address in Kent, it was held that the venue was rightly laid in Middlesex, as the prisoner, by directing the money order to be sent by post, constituted the postmaster in

State v. Bartlett, 11 Vt. 650; though see *contra*, *Com. v. Uprichard*, 3 Gray, 434.

¹ Whart. Crim. Law, 8th ed. § 1810.

² *Supra*, § 102.

³ Whart. Crim. Law, 8th ed. §§ 248, 279; *R. v. Jones*, 4 Cox C. C. 198, cited *infra*, § 113; *R. v. Garrett*, 6 Cox C. C. 260; S. C., Dears. 232; *R. v. Johnson*, 7 East, 65; *Com. v. Smith*, 11 Allen, 243; *State v. Grady*, 34 Conn. 119; *People v. Adams*, 3 Denio, 190; 1 Comst. 173. See *State v. Wyckoff*, 2 Vroom, 65; *Com. v. Gillespie*, 7 S. & R. 469; *Bloomer v. State*, 48 Md. 321; and discussion in Whart. Crim. Law, 8th ed. §§ 279, 280, and notes thereto.

⁴ *Supra*, § 111. For authorities see Whart. Crim. Law, 8th ed. § 1397.

⁵ *R. v. Girdwood*, 1 Leach, 142; *Com. v. Blanding*, 3 Pick. 304; *People v. Griffin*, 2 Barb. 427; *People v. Rathbun*, 21 Wend. 533; Whart. Crim. Law, 8th ed. § 1620.

⁶ Whart. Crim. Law, 8th ed. §§ 288, 1620; *R. v. Burdett*, 4 B. & A. 95; *Perkins's case*, 2 Lew. 150; 2 East P. C. 420; *R. v. Jones*, 4 Cox C. C. 198; 1 Den. C. C. 551; *U. S. v. Worrall*, 2 Dall. 388; Whart. St. Tr. 189. As to libel see *Dana's case*, 7 Ben. 1, where it was not contested that the place of reception had jurisdiction, though the case was decided on other grounds. As to proof of publication of libel in a particular place see Whart. Crim. Law, 8th ed. § 1620.

Middlesex his agent to receive it there for him ; and that consequently there was a receipt of the money order by the prisoner.¹

A challenge to fight a duel in another State is as indictable as a challenge to fight a duel in the State where the challenge is sent.²

A letter containing an offer to bribe a public officer is as indictable in the place where it is mailed³ as it is in the place where it is received and opened.

IV. WRITTEN INSTRUMENTS AND RECORDS.

§ 114. When an indictment undertakes to set forth, as in forgery or libel, a document according to its "tenor," or "as follows," then any variance as to the words of the document, unless such variance be mere fault of spelling, is fatal.⁴ But it is otherwise as to the variance of a letter, amounting only to misspelling.⁵ Nor is it necessary that the vignettes and figures on the margin of a note should be copied in the indictment,⁶ though if set forth a variance may be fatal.⁷

A contraction of a word to an initial letter is a material variance.⁸

¹ R. v. Jones, 4 Cox C. C. 198; 1 Den. C. C. 551; 1 Eng. L. & Eq. 533. See Whart. Crim. Law, 8th ed. §§ 288, 1774.

² State v. Farrier, 1 Hawks, 487; State v. Taylor, 1 Const. R. 107; 3 Brev. 243. See R. v. Williams, 2 Camp. 506; Ivey v. State, 12 Ala. 276; Whart. Crim. Law, 8th ed. § 1774.

³ U. S. v. Worrall, 2 Dall. 388.

⁴ Whart. Cr. Pl. & Pr. §§ 168, 173; Whart. Crim. Law, 8th ed. 737; 1 Leach, 78; 2 Leach, 660, 661; 2 East P. C. 976; U. S. v. Keen, 1 McLean, 429; State v. Bonney, 34 Me. 383; State v. Witham, 47 Me. 165; State v. Bean, 19 Vt. 530; Com. v. Wright, 1 Cush. 66; Com. v. Ray, 3 Gray, 441; State v. Farrand, 3 Halst. 336; Dana v. State, 2 Oh. St. 91; People v. Marion, 28 Mich. 255.

⁵ Whart. Cr. Pl. & Pr. § 173; 1 Leach, 192; Dougl. 193, 194; R. v. Drake, Salk. 660; R. v. Wilson, 2 C. & K. 527; 1 Den. C. C. 284; 2 Cox C. C. 426; U. S. v. Hinman, 1 Bald. 292; U. S. v. Burroughs, 3 McL. 405; State v. Bean, 19 Vt. 530; Com. v. Riley, Thach. C. C. 67; Com. v. Parmenter, 5 Pick. 279; People v. Warner, 5 Wend. 271; State v. Weaver, 13 Ired. 491. As to clerical errors see Wh. Cr. Pl. & Pr. §§ 273-5.

⁶ State v. Carr, 5 N. H. 367; Com. v. Bailey, 1 Mass. 62; Com. v. Taylor, 5 Cush. 605; People v. Franklin, 3 Johns. Cas. 299; Com. v. Searle, 2 Binn. 332; Buckland v. Com. 8 Leigh, 732; Griffin v. State, 14 Oh. St. 55; Whart. Crim. Law, 8th ed. § 731.

⁷ Griffin v. State, 14 Oh. St. 55. See Buckland v. Com. 8 Leigh, 732.

⁸ R. v. Barton, 1 Mood. C. C. 141;

A variance in a translation, so that the translation does not give the sense of the original, is fatal.¹

Parts of a document which are extraneous to that on which the prosecution rests need not be set out in the indictment.²

§ 114 a. The pleading of documents is discussed at large in another work, where it is shown that when the words Pleading, of a document are material they should be set forth ;³ &c. that in such case the indictment should purport to set forth the

R. v. Inder, 2 C. & K. 635; *Com. v. Kearns*, 1 Va. Cas. 109.

¹ Whart. Crim. Law, 8th ed. § 729; *R. v. Goldstein*, R. & R. 473. As to translations from Chinese see *People v. Ah Woo*, 28 Cal. 208.

² *R. v. Testick*, 1 East, 181 n; *Com. v. Ward*, 2 Mass. 397; *Com. v. Adams*, 7 Met. 50; *Com. v. Perkins*, 7 Grat. 654; *Simmons v. State*, 7 Ham. 116; Wh. Cr. Pl. & Pr. § 180. That matters of mere surplusage need not be set out see also Whart. Crim. Law, 8th ed. § 733.

It has been held a variance where the instrument alleged to be forged was set out as an acquittance, or discharge for forty-eight dollars, and the paper on its face showed an order for forty-eight dollars, but contained on its back a further order for one dollar. *State v. Handy*, 20 Me. 81. And an indictment describing a note as payable to Henry C. Dorsey, on December 11, is not sustained by proof of a note payable to Henry Pinkham, and due the 7th and 10th of December. *State v. Snell*, 9 R. I. 112.

Where an indictment charged that an alleged counterfeit bill was a note purporting to be a note of the P. & M. Bank of South Carolina, which was the name given by the charter, but the tenor of the note as set forth was "the President, Directors, & Co.," as in the note, it was held that the statement in the note was a mere

designation of the persons composing the corporation, who made themselves liable for the payment of the note, and that there was no variance or repugnancy between the tenor and purport. *State v. Calvin, Charlton*, 151. But an indictment for forging a writing, describing the same as purporting to be signed by the president and directors of a bank, and setting out the forged writing verbatim, but upon the face of it not appearing to have been by order of the president and directors, is bad. *State v. Shawley*, 5 Hayw. 256.

On an indictment for forging a railroad ticket, expressed on its face to be "good for this day only," a description of the ticket, as signifying to the holder that it must be used continuously and without stopping at intermediate stations, after once entering the cars, is a fatal variance. *Com. v. Ray*, 3 Gray, 441.

Where a forged paper was passed by a prisoner, bearing date in 1828, and immediately after, with the knowledge of the holder, the prisoner altered the date to 1827, and the indictment set forth its tenor and described it as dated in 1827, it was held that the paper was proper evidence to go to the jury in support of the indictment, notwithstanding the proof that it bore date in 1828 when passed. *Huffman v. Com.* 6 Rand. (Va.) 685.

³ Wh. Cr. Pl. & Pr. § 167.

words;¹ that “purport” means “effect,” and “tenor” means “contents;”² that “manner and form,” “purport and effect,” and “substance” do not imply verbal accuracy,³ that quotation marks are not sufficient to indicate tenor,⁴ that a document lost or in defendant’s hands need not be set forth;⁵ that this rule is not affected by the prosecutor’s negligence;⁶ that the production of a document alleged to be destroyed is a fatal variance;⁷ that extraneous parts of a document need not be set forth;⁸ that a foreign or insensible document must be explained by averments;⁹ and that statutory designations of documents must be followed.¹⁰ “Receipt,” it will be seen, includes all admissions of payment;¹¹ “Acquittance,” a discharge from duty;¹² “Treasury Notes” may be stated as such;¹³ “Money” may be treated as convertible with currency;¹⁴ “Obligations” and “Undertakings” are unilateral engagements;¹⁵ and “Property” is whatever may be appropriated.¹⁶ Other definitions of statutory designations will be given hereafter.¹⁷ It will be also seen that though the designation is sufficient, yet if the indictment purports to give words, a variance may be fatal.¹⁸

It should be added, that the rigor of the common law has been modified in most jurisdictions by statutes which permit amendments of the indictment to be made, in cases of variance, at the discretion of the court.¹⁹ Such statutes have in several instances been held constitutional.²⁰

§ 115. In respect to records great care is necessary, as any variance will, at common law, be fatal.²¹ Thus, at
Accuracy required as to records. common law, if the whole record to which perjury is

¹ Whart. Cr. Pl. & Pr. § 168.

² Ibid. § 169.

³ Ibid. § 170.

⁴ Ibid. § 175.

⁵ Ibid. § 176.

⁶ Ibid. § 178.

⁷ Ibid. § 179.

⁸ Ibid. § 180.

⁹ Ibid. § 181.

¹⁰ Ibid. § 182. *Infra*, § 116 *a*.

¹¹ Ibid. § 185.

¹² Ibid. § 186.

¹³ Ibid. § 189 *a*.

¹⁴ Ibid. § 190.

¹⁵ Ibid. §§ 198, 199.

¹⁶ Ibid. § 201.

¹⁷ *Infra*, § 116 *a*.

¹⁸ Ibid. § 183.

¹⁹ Ibid. § 90.

²⁰ Ibid. § 90-1.

²¹ *Pope v. Foster*, 4 T. R. 590; *Woodford v. Ashley*, 11 East, 508; 2 Saund. 291 *b*; *U. S. v. Bowman*, 2 Wash. C. C. 328; *U. S. v. M’Neal*, 1 Gallison, 387; *Com. v. Monahan*, 9 Gray, 116.

incidental is not accurately set forth, there must be an acquittal.¹

§ 116. Whenever the object is merely to give the legal character of the document, as in indictments for larceny and receiving stolen goods, it is only necessary to describe the document by its general designation, without setting out its words. In such cases there will be no variance if the legal effect of the document be accurately given.²

When legal effect is given, it is sufficient if proof substantially conforms.

§ 116 a. The general designation of a document in cases of larceny, embezzlement, false pretences, and the like, when this designation is the only mode of identification, must be proved as laid.

General designation must be accurate.

A "deed," for instance, must be sustained by the production of a document under seal, of *prima facie* validity for the transfer of legal rights.³ Under "undertaking" may be put in evidence a guarantee,⁴ and an I O U.⁵

Under "money" may be put in evidence whatever is a legal tender.⁶

In what way legal tenders and national currency in the United States are to be described depends upon local statutes, and is elsewhere discussed.⁷

Under "goods and chattels" may be introduced whatever is the subject of common law larceny.⁸

¹ See fully Whart. Crim Law, 8th ed. § 1314.

² Whart. Cr. Pl. & Pr. §§ 182 *et seq.*; Starkie's C. P. 217; Craven's case, 2 East P. C. 601; U. S. v. Keen, 1 McLean, 429; U. S. v. Burroughs, 3 McLean, 405; Com. v. Richards, 1 Mass. 337; Com. v. Sawtelle, 1 Cush. 142; Com. v. Cahill, 12 Allen, 540; People v. Holbrook, 13 Johns. 10; People v. Wiley, 3 Hill, 194; People v. Jones, 5 Lansing, 340; Com. v. Boyer, 1 Binn. 201; Stewart v. Com. 4 S. & R. 194; State v. Rout, 3 Hawks, 618; Merrill v. State, 45 Miss. 651. If, however, the indictment undertakes to set forth the document, instead of giving its general effect,

then the document must be set forth correctly, and at common law a variance is fatal. Supra, § 114; Whart. Cr. Pl. & Pr. § 182; U. S. v. Keen, 1 McLean, 429.

³ R. v. Fauntleroy, 1 C. & P. 421; 1 Mood. C. C. 52; R. v. Lyon, R. & R. 255. See R. v. Morton, 12 Cox C. C. 456; L. R. 2 C. C. 22.

⁴ R. v. Joyce, 10 Cox C. C. 100; L. & C. 576; R. v. Reed, 2 Mood. C. C. 62.

⁵ R. v. Chambers, L. R. 1 C. C. 341.

⁶ R. v. West, 7 Cox C. C. 183; Dears. & B. 109; R. v. Godfrey, Dears. & B. 426.

⁷ Whart. Cr. Pl. & Pr. § 189 a.

⁸ Whart. Cr. Pl. & Pr. § 191, *q. v.*

“A warrant” for the payment of money includes any writing on which a *prima facie* case could be made out for the delivery of goods or money.¹ An “order” implies, in addition, some sort of *prima facie* mandatory power;² a request includes mere invitation.³

Under the term “personal goods” may be proved money and bank notes,⁴ but not, it seems, under the title “goods and chattels.”⁵

“A bank note of the value,” &c., may be sustained in Massachusetts by proof of the note of any bank authorized by the laws of the Commonwealth.⁶ In most States, however, the practice is to specify the bank, which specification must be proved.⁷

“Bond” is not sustained by proof of a document not under seal.⁸

“Bill of exchange” is not sustained when the paper is so defective as not to amount to a negotiable bill.⁹

“Promissory note” may be sustained by proof of a due bill,¹⁰ and of a bank note, when the statute does not specially classify such securities;¹¹ nor is it necessary that such a note should be

as to how far “bank-notes” and “tickets” are goods and chattels.

¹ Ibid. § 193.

² Ibid. § 194.

³ Ibid. § 195.

⁴ U. S. v. Moulton, 5 Mason, 537.

⁵ State v. Calvin, 2 Zab. 207.

⁶ Com. v. Richards, 1 Mass. 337; Larned v. Com. 12 Met. 240; Com. v. Sawtelle, 11 Cush. 142; Com. v. Cahill, 12 Allen, 540; Eastman v. Com. 4 Gray, 416; Com. v. Grimes, 10 Gray, 470.

⁷ R. v. Jones, Dougl. 800; 1 Leach, 79; R. v. Reading, 2 Leach, 590; 2 East P. C. 952; Salisbury v. State, 6 Conn. 101; People v. Holbrook, 13 Johns. 10; People v. Wiley, 3 Hill, 194; People v. Jackson, 8 Barb. 637; Spangler v. Com. 3 Binn. 533; Grummond v. State, Wilcox, 510; State v. Rout, 3 Hawks, 618. See Starkie's

C. P. 217; Whart. Cr. Pl. & Pr. § 189. That an undue specification may lead to a variance see R. v. Craven, R. & R. 14.

When the indictment averred the note to be issued by “the Bank of N.,” and the note on its face appeared to have been issued by the “President and Directors of The Bank of N.,” the variance was held to be fatal. State v. Williamson, 3 Murph. 216.

⁸ Salisbury v. State, 6 Conn. 101.

⁹ R. v. Curry, 2 Mood. C. C. 218; R. v. Mopsey, 11 Cox C. C. 143; People v. Howell, 4 Johns. 296, and other cases cited Whart. Cr. Pl. & Pr. § 187.

¹⁰ People v. Finch, 5 Johns. 237.

¹¹ See cases cited Whart. Cr. Pl. & Pr. § 188; Com. v. Butts, 124 Mass. 449; Com. v. Gallagher, 126 Mass. 54; Com. v. Griffiths, 126 Mass. 252.

locally negotiable.¹ Even an imperfect instrument, if susceptible of being put in suit, may be offered under the name of a "promissory note."²

It should, however, be observed that the distinctions above noticed are conditioned upon the terms of the statutes under which they may arise. If a statute, for instance, should make it larceny to steal all "undertakings" for the payment of money, then bonds and notes could be put in evidence under the general designation of "undertaking." If the statute, however, should say "undertakings, bonds, or notes," then the distinction between undertakings, bonds, and notes must be maintained in the indictment.

§ 117. The usual practice is, where a variance is plain, not to allow the instrument to go in evidence; but if the forged writing is uncertain, and susceptible of being read as agreeing with the words stated in the indictment, the jury are to pass on the question of fact.³ An undecipherable inscription need not be averred or proved.⁴

When variance is doubtful, case is for jury.

¹ Story on Bills, § 90; Sibley v. Phelps, 6 Cush. 172; People v. Bradley, 4 Parker C. R. 245.

² Com. v. Dallinger, 118 Mass. 439.

³ Turpin v. State, 19 Oh. St. 540. But see Oneil v. State, 48 Ga. 66.

On a trial for passing a counterfeit bank note, the defendant moved to exclude the note from going to the jury, on the ground that the name of one of the firm of engravers, set out in the description of the note in the indictment, did not appear on the note produced; the attorney for the Commonwealth proved that when he drew the indictment he had been able to make out the name on the note from his knowledge that one of the firm of engravers bore that name, though he could not say he would have been able to do so without the knowledge of the fact, but that the word had since become indistinct, he supposed, by handling the note; the court below

thereupon overruled the motion to exclude, and permitted evidence to be given of the note thus produced. It was held by the court of errors that the action of the court below was right. Buckland v. Com. 8 Leigh, 732; and see U. S. v. Mason, 12 Blatch. 197.

In Com. v. Gateley, 126 Mass. 52, the indictment charged D. with the embezzlement of treasury notes and national bank bills. The evidence showed that D. was intrusted by his employer with a bank check payable to bearer, for the purpose of paying a note, without any direction whether to pay the note with the check or to draw the money on the check and then pay the note; that generally notes were paid with checks, but the practice was not uniform; that while the check was in D.'s possession he made up his mind to take his employer's funds in his possession and use them; and drew the money on the

⁴ U. S. v. Mason, 12 Blatch. 497.

§ 118. Where the document on which the case rests is destroyed, lost, or in the possession of the defendant before bill found, it will be sufficient to set forth the substance and effect of the document, averring at the same time, as an excuse for its non-publication, its loss, destruction, or detention, as the case may be. In such case it will be admissible on trial to give parol evidence of the document, and such evidence, if there be no substantial variance, will sustain the indictment.¹ In England, where the document is in the defendant's hands, the practice is to give notice to the defendant to produce the writing at the assize, so that it may be brought before the grand jury. Such notice, however, as will hereafter be seen, is not considered necessary wherever the indictment in itself is a notice.² Thus, on a trial of an indictment for stealing a bank bill, where the bill is in the defendant's possession, it is not necessary to account for the non-production,

check. It was ruled that the question of variance was for the jury.

It has been ruled in Alabama that a demurrer to an indictment for forgery, on account of a variance between the instrument described therein and that offered in evidence at the trial, cannot be considered by the court, unless oyer of the instrument is craved. *Butler v. State*, 22 Ala. 42. But the proper course is not to demur, but to take advantage of the variance under the plea of not guilty.

¹ *Infra*, § 199-212; Whart. Cr. Pl. & Pr. § 176; *R. v. Haworth*, 4 C. & P. 254; *R. v. Hunter*, 4 C. & P. 128; *R. v. Vernon*, 12 Cox C. C. 153; *R. v. Colucci*, 3 F. & F. 103; *Bucher v. Jarrett*, 3 B. & P. 145; *U. S. v. Britton*, 2 Mason, 464; *People v. Kingsley*, 2 Cow. 522; *People v. Badgeley*, 16 Wend. 53; *State v. Parker*, 1 Chipman, 298; *State v. Potts*, 4 Halst. 26; *Com. v. Messenger*, 1 Binn. 274; *Pendleton v. Com.* 4 Leigh, 694; *State v. Davis*, 69 N. C. 313; *Thompson v. State*, 30 Ala. 28. Service of notice to produce

on an attorney who had served a notice on behalf of the prisoner, as to an application to bail him upon the charge, is sufficient. *R. v. Boucher*, 1 F. & F. 486 — Martin. An indictment alleged that the prisoner, being in the employ of the post-office, stole a post-letter, to wit, a post-letter directed and addressed as follows, that is to say (setting out the address), which contained property. At the trial, a witness having deposed that he employed a man to post a letter containing the property in question, it was held that he might be asked how that letter was addressed, though no notice to produce the letter had been given. *R. v. Clube*, 3 Jur. N. S. 698 — Pollock. See *infra*, §§ 216-8.

An obscene picture need not be copied in the indictment, though if the effect of the picture be generally misdescribed, this will be a fatal variance. *Com. v. Dejardin*, 126 Mass. 46. As to obscene documents generally see Whart. Crim. Pl. & Pr. § 177.

² *Infra*, § 216, and cases in note, *supra*.

the fact of the indictment being found being sufficient notice to the defendant to produce.¹ And though an indictment for passing counterfeit money purport to set forth the counterfeit note according to its tenor, and contain no averment of its loss or destruction, the production of the note, it has been held, may be dispensed with, upon proof that the same has been mutilated and destroyed by the defendant, and other evidence of its contents may be admitted,² though the more correct course is to aver such mutilation or destruction, if it took place before the finding of the indictment. And as an accomplice is presumed to destroy letters implicating him in guilt, it is not necessary, it has been said, to prove diligent search for such letters, in order, on general proof of their loss, to give parol evidence of their contents.³ But should a document, alleged to have been destroyed, turn up on the trial, the variance is fatal.⁴

§ 119. Where it is claimed that a document is lost, the proof of the loss must be satisfactory and full, to enable parol evidence to be given of its contents.⁵ *Negligence by prosecutor* in leading to loss does not necessarily exclude secondary evidence.⁶

Loss must be satisfactorily shown.

§ 120. When public justice requires, the court may make before the trial an order on the prosecution to produce papers for the defendant's inspection.⁷

Inspection may be ordered.

V. WORDS SPOKEN.

§ 120 a. When the indictment avers words spoken, it is enough if there is a substantial accordence between the words as laid and the words as proved. But any variance of sense will be fatal.⁸ Any portion of the words laid,

Words spoken to be substantially proved.

¹ *People v. Holbrook*, 13 Johns. 90; *Com. v. Messenger*, 1 Binn. 274.

² *State v. Potts*, 4 Halst. 26.

³ *U. S. v. Doeblor*, 1 Bald. 519.

⁴ *Smith v. State*, 33 Ind. 159.

⁵ *Infra*, § 206.

⁶ *Infra*, § 201; *State v. Taunt*, 16 Minn. 109.

⁷ *R. v. Colucci*, 3 F. & F. 103. *Infra*, § 566.

⁸ *Fost.* 194; *R. v. Layer*, 8 Mod. 33; *Whart. Cr. Pl. & Pr.* § 203; *People v. Warner*, 5 Wend. 271; *State*

v. Bradley, 1 Hayw. 403; *State v. Coffey*, N. C. Term R. 272; *State v. Ammons*, 3 Murph. 123.

An indictment for sedition alleged "that the defendant, amongst other words and matter, uttered the words and matter following," and then set out several sentences as though they had been uttered continuously. The evidence showed that they had not been so uttered, but that the sentences had been selected from different parts

complete in itself, and constituting an indictable offence, will sustain the indictment.¹

VI. GOODS, NUMBERS, AND SUMS.

§ 121. The description of articles of personal property, as given in the indictment, must be substantially proved, so that (1.) Award of restitution may, if proper, be given; (2.) The defendant may be protected from further proceedings on the same charge; (3.) Sentence may be duly graded; and (4.) The offence may be individuated in a court of error.² And this will be the case even when the goods are described in the indictment with unnecessary particularity, unless the unnecessary part of the description can be rejected as surplusage.³ But it has been held that "thirty yards of cloth" and "one coat" sufficiently describe "one piece of cassimere" and "one blue pilot cloth coat," which it was proved the defendant stole,⁴ and "fifty pounds of flour, of the value of six cents," has been held to be sustained by proof of a bag of flour which cost five dollars, although there was no proof of its weight.⁵ On the other hand, an averment of stealing a ploughshare has been held not to be sustained by proof of stealing a plough.⁶ And in a case decided in Massachusetts in 1876, where

of the speech, other matter intervening between them. It was held that there was no variance, and that if any portions of the speech omitted varied or controlled the sense of those set out, the onus was upon the defendant to show it. *R. v. Crowe*, 3 Cox C. C. 123.

The words set out in an indictment for sedition were these, "If the Queen neglects to recognize the people, then the people must neglect to recognize the Queen." It was proved that the word "forget" was used in both instances, and not "neglect." This was ruled a fatal variance as far as that sentence was concerned, and that the passage must be struck out. *R. v. Fussell*, 3 Cox C. C. 291.

As to pleading see Whart. Crim. Pl. & Pr. § 203. As to words in per-

jury see Whart. Crim. Law, 8th ed. §§ 1297 *et seq.*, 1313.

¹ *Com. v. Kneeland*, 20 Pick. 206.

² *Arch. C. P.* 66; *Com. v. James*, 1 Pick. 376; *People v. Jackson*, 8 Barb. 637; *Com. v. Wentz*, 1 Ashm. 269; *State v. Horan*, Phill. (N. C.) 571; *State v. Sansom*, 3 Brev. 5. Thus proof of two boots for the right foot will not sustain an averment of "a pair of boots." *State v. Harris*, 3 Harring. 559; Whart. Cr. Pl. & Pr. § 208. For instances of variance see *infra*, §§ 124-46.

³ *R. v. Edwards*, R. & R. 497. As to surplusage see *infra*, § 138. As to what descriptions are surplusage see *infra*, § 146.

⁴ *Com. v. Campbell*, 103 Mass. 436.

⁵ *State v. Harris*, 64 N. C. 127.

⁶ *State v. Cockfield*, 15 Rich. 316.

the indictment charged the defendant with the larceny of a number of bottles of whiskey and brandy, it was ruled that this was not sustained by proof that the defendant drew the liquor from casks into bottles he took with him for the purpose.¹

Questions of variance as to goods are ordinarily for the jury.²

As will be elsewhere seen, personal chattels, when the subjects of an offence, must be adequately described in the indictment;³ and the certainty must be such as to individuate the offence.⁴ Dead animals must be averred to be such;⁵ when only certain articles of a class are the subjects of the offence, those articles must be specified,⁶ and minerals must be averred to be detached from realty.⁷

§ 122. Coin must be specifically described, though it is for the jury to determine whether the proof comes up to the description.⁸

Coin must be specifically proved.

§ 123. When several articles are charged, the proof must apply to one or more of the articles. Hence an indictment charging a stealing of a number of things is not supported except by proof of some one or more of the specific things so charged.⁹ Therefore an indictment charging a stealing of seventy pieces of the current coin of the realm called sovereigns, of the value of £70; 140 pieces, &c., called half-sovereigns, &c.; 500 pieces, &c., called crowns, &c.,

Proof must come up to some one article charged.

¹ *Com. v. Gavin*, 121 Mass. 54.

² *State v. Campbell*, 76 N. C. 261.

³ Whart. Crim. Pl. & Pr. § 206.

⁴ *Ibid.* § 208.

⁵ *Ibid.* § 209.

⁶ *Ibid.* § 210.

⁷ *Ibid.* § 211.

⁸ As to the pleading of coin and bullion see Whart. Cr. Pl. & Pr. § 218. As to what descriptions are surplusage see *infra*, § 146; and see Whart. Crim. Law, 8th ed. § 944.

Where a person was indicted for uttering counterfeit coin, intended to resemble and pass for a "groat," and all the witnesses, except the inspector of coin at the mint, called it a four-penny piece, but the inspector called it a groat, and said he believed that

it had had that name from the earliest period, and added, that the original groat of Edward III.'s reign was larger and heavier than the coin in question; and that in the queen's proclamation these coins were called both groats and four-penny pieces, but the proclamation was not produced, and the inscription on the coin itself was "four pence;" it was held that if the jury, from their own knowledge of the English language, without considering any evidence at all, were of opinion that a groat and four-penny piece were the same, the prisoner was rightly indicted, and might be convicted. *R. v. Connell*, 1 C. & K. 190.

⁹ See *infra*, §§ 132, 145.

is not supported by proof of a stealing of a sum of money consisting of some or other of the coins mentioned in the indictment, without proof of some one or more of the specific coins charged to have been stolen.¹

When the indictment charges the stealing of certain particular coin, there can be no conviction for stealing other coin.² Thus where a note is given to a party to change, he cannot, on an indictment for stealing the note, be convicted on proof of stealing the change.³ And where the defendant obtained a sovereign from the prosecutor, in payment of a supposed debt of a shilling, and the prosecutor never intended to part with the sovereign until she received the nineteen shillings change; it was held that an indictment charging the larceny of nineteen shillings was bad, as the case, if made out, was that of larceny of a sovereign.⁴

§ 124. To attempt to describe an animal exactly would be futile. Cattle, for instance, is a generic term, and dogs
 Animals must be substan- present numberless varieties in shape, size, color, habit,

¹ R. v. Bond, 1 Den. C. C. 517. See Whart. Cr. Pl. & Pr. § 207.

² Archbold's C. P. (ed. 1862), 190; Whart. Crim. Law, 8th ed. § 944; Whart. Cr. Pl. & Pr. § 219; R. v. Jones, 1 Cox C. C. 105; R. v. West, Dears. & B. 109; 7 Cox C. C. 183. See, on general principles of construction, R. v. Amos, 2 Den. C. C. 65; 1 Eng. L. & Eq. 592; T. & M. 465.

P. bought a horse, and was entitled to the return of 10s. chap money out of the purchase money, and afterwards, on the same day, met the seller, D., and others together in company, and asked the seller for the 10s., but he said he had no change, and offered a sovereign to P., who could not change it. P. asked whether any one present could give change. D. said he could, but would not give it to the seller of the horse, but would give it to P., and produced two half-sovereigns. P. then offered a sovereign of his own with one hand to D., and held out the other

hand for the change. D. took the sovereign and put one half-sovereign only into P.'s hand, and slipped the other into the hand of the seller, who refused to give it to the prosecutor and ran off with it. It was ruled that the indictment rightly charged D. with stealing a sovereign. R. v. Twist, 12 Cox C. C. 509; 1 Green's C. C. 44.

³ Whart. Crim. Law, 8th ed. §§ 944, 962, 965.

⁴ R. v. Bird, 12 Cox C. C. 257; 27 L. T. (N. S.) 800; R. v. Gumble, 27 L. T. (N. S.) 692; 12 Cox C. C. 248; L. R. 2 C. C. 1. "The word *shilling* (Blackburn, J. 12 Cox C. C. 259) must be taken as descriptive of the thing stolen, and must be proved." Archbold's C. P. (ed. 1862) 90; R. v. Deeley, 1 Mood. C. C. 303; R. v. Owen, 1 Mood. C. C. 118; R. v. Craven, R. & R. 14; R. v. West, D. & B. 109; R. v. Bond, 1 Den. C. C. 517; R. v. Jones, 1 Cox C. C. 105.

and aptitude; and yet it is sufficient, at common law, ^{tially} from the fact that exhaustiveness of description must ^{proved as} described. stop somewhere, to describe cattle by the general term "cattle," or a dog by simply the general term "dog."¹ Whether sex must be stated, or degree of maturity, depends upon the statute under which the prosecution is had. Where the statute uses the term "dog," or "horse," or "sheep," then these terms are regarded as general, under which it is not necessary for the indictment to specify sex or age. On the other hand, where the statute makes a distinction between "horses" and "mares," or between "sheep" and "lambs," then proof of a mare would not sustain an indictment for stealing a horse, nor proof of a lamb an indictment for stealing a sheep.² It must be remembered,

¹ *People v. Littlefield*, 5 Cal. 355. See *R. v. Gallears*, 2 C. & K. 981; 1 Den. C. C. 501; *R. v. Beany*, R. & R. 416; *R. v. Welland*, R. & R. 494; *R. v. Chard*, R. & R. 488.

² Under statutes making it a felony to steal any ox, cow, or heifer, where the indictment charges the defendant with stealing a cow, proof of its being a heifer will not suffice; for the statute having mentioned both cow and heifer proved that the words were not considered by the legislature as synonymous. *R. v. Cooke*, 2 East P. C. 617; *Leach*, 123. See *Parker v. State*, 39 Ala. 365; *State v. Plunket*, 2 Stew. 11; *Turley v. State*, 3 Humph. 323. For statutory designations see Whart. Cr. Pl. & Pr. § 237.

At common law an indictment for stealing a sheep is supported by proof of the stealing of any sex or variety of that animal, for the term is *nomen generalissimum*. *McCully's case*, 2 Lew. C. C. 272; *R. v. Spicer*, 1 Den. C. C. 82; 1 C. & K. 699. See Whart. Cr. Pl. & Pr. §§ 209, 237. And an indictment for stealing a sheep will be supported by proof of stealing a lamb. *State v. Tootle*, 2 Harring. 541. See *R. v. Spicer*, 1 C. & K. 699.

On an indictment for stealing a horse, proof that it was a gelding is a fatal variance, the statute making a distinction between horses and geldings. *Hooker v. State*, 4 Ohio, 350; *Turley v. State*, 3 Humph. 323. See Whart. Cr. Pl. & Pr. § 237; *Banks v. State*, 28 Tex. 644; *Marshall v. State*, 31 Tex. 471; *Gholstan v. State*, 33 Tex. 342; *Persons v. State*, 3 Tex. Ap. 240. Under a statute prohibiting the stealing of horses, the term *horses* is construed as including *mares*; *State v. Dunnivant*, 3 Brev. 9; *Marshall v. State*, 31 Tex. 471; but see *contra*, *Banks v. State*, 28 Tex. 644; though in South Carolina it was somewhat inconsistently ruled that under the statute against *hog* stealing, an indictment for stealing a *pig* could not be sustained. *State v. M'Lain*, 2 Brev. 443; and see *R. v. Loom*, 1 Mood. C. C. 160; *R. v. Puddifoot*, 1 Mood. 247; *R. v. Beany*, R. & R. 416; *R. v. Welland*, R. & R. 494. In England, however, it has been said that when the name of the grown animal is given as a *nomen generalissimum*, then the young animal is included under this general term. *R. v. Welland*, R. & R. 494.

On the other hand, where, under

however, that although it may be unnecessary to specify color, sex, or degree of maturity, yet such specification, if ventured, must be proved as laid.¹ Nor can the term "live" be rejected as surplusage. Thus where the prisoner was indicted for stealing four live tame turkeys, and it appeared that he stole them alive in the county of Cambridge, killed them there, and carried them into Hertfordshire, where he was tried, the judges held that the word "live" in the description could not be rejected as surplusage, and that as the prisoner had not the turkeys in a live state in Hertfordshire, the charge as laid was not proved, and that the conviction was wrong. And Holroyd, J., observed that an indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal it is to be intended that he stole it alive.² It is otherwise, however, where the animal has the same name living or dead.³

§ 125. A variance in the number of the goods, if the number stated does not constitute the essence of the offence, is immaterial. The proof of any one of several articles duly pleaded will sustain a verdict.⁴ At the same time, as we have seen, where a series of special coins or notes are averred, and the jury find the defendant guilty of stealing *some* of the coins or notes averred, but declaring that they are not able to specify which, the conviction cannot be sustained.⁵

Where an indictment charged the defendant with stealing five certificates of shares of stock of the number 7,056, and the proof

an indictment under the 9 Geo. 1, c. 22, for killing "certain cattle, to wit, one *mare*;" the evidence was that the animal was a colt, but of which sex did not appear; the prisoner being convicted, the judges, on a case reserved, were of opinion that the words, "a certain *mare*," though under a *videlicet*, were not surplusage, and that the animal proved to have been killed being a *colt* generally, without specifying its sex, was not sufficient to support a charge of killing a *mare*. *R. v. Chalkley*, R. & R. 258.

¹ 1 Green. Ev. § 65; Rosc. Cr. Ev. 102; *Turner v. State*, 3 Heisk. 452.

² *R. v. Edwards*, R. & R. 497.

³ *R. v. Puckering*, 1 Mood. C. C. 242. See *Com. v. Beaman*, 8 Gray, 497; Whart. Crim. Law, 8th ed. § 876; Whart. Cr. Pl. & Pr. § 209.

⁴ See *infra*, § 132; Burn's Justice, 29th ed. by Ch. & Bears, title Evidence; *State v. Cameron*, 40 Vt. 555; *Com. v. Williams*, 2 Cush. 583; *Com. v. O'Connell*, 12 Allen, 451; *Lorton v. State*, 7 Mo. 55.

⁵ *R. v. Bond*, 4 Cox C. C. 231; 1 Den. C. C. 517.

showed there was but one such certificate, and not a series of five, as alleged, there was a fatal variance.¹

§ 126. It is unnecessary to prove the value laid in the indictment unless the precise sum forms the essence of the offence, or is stated as a matter of description.² Thus, on an indictment for extortion, or taking a greater brokerage than is allowed by the act of parliament, it is not necessary to prove the taking of the precise sum laid.³ But if the value of the property is essential to constitute an offence, it must be proved to have been sufficient for that purpose. Value may be inferred from the general testimony, without precise proof.⁴ *Some* value must be thus inferable.⁵ The value of legal tenders need not be proved.⁶

Variance as to value immaterial, unless value be descriptive.

§ 127. On an indictment charging collectively the larceny of several different articles of varied values, with only a gross value assigned, no conviction should be had on evidence of stealing only a part.⁷ Nor can a conviction for stealing a part of the articles charged be sustained unless to such part a sufficient value is assigned directly or inferentially.⁸ On the other hand it has been said that where several articles, all of one kind, are described, their value may be al-

Collective value does not sustain specific.

¹ *People v. Coon*, 45 Cal. 672.

² *Com. v. Morrill*, 8 Cush. 571; *Com. v. McKenney*, 9 Gray, 114; *Com. v. Burke*, 12 Allen, 182; *Com. v. Gallagher*, 126 Mass. 54; *State v. Harris*, 64 N. C. 127; *Whart. Crim. Law*, 8th ed. § 951.

The provision of the N. Y. statute (2 R. S. 679, § 66), declaring, that "if the property stolen consists of any . . . draft, . . . the money due thereon or secured thereby and remaining unsatisfied, or which in any contingency might be collected thereon, . . . shall be deemed the value," does not make part of the description of the offence, but simply furnishes a mode of proving it. *Phelps v. People*, 72 N. Y. 334.

³ *R. v. Gilham*, 6 T. R. 265; *Grimwood v. Baritt*, *Ibid.* 462; *Pope v. Foster*, 4 T. R. 590.

⁴ *Whart. on Ev.* § 1290; *Remsen v. People*, 57 Barb. 324; *Com. v. Logan*, 3 Brewst. 341.

⁵ *People v. Griffin*, 38 How. (N. Y.) Pr. 475.

⁶ *Whart. Cr. Pl. & Pr.* § 216.

⁷ *Hope v. Com.* 9 Met. 134; *Com. v. Cahill*, 12 Allen, 540; *Com. v. Lavery*, 101 Mass. 207; *Rhodus v. Com.* 2 Duv. 159; *State v. Longbottoms*, 11 Humph. 39; *State v. Murphy*, 6 Ala. 845; *Sheppard v. State*, 42 Ala. 531. See *O'Connell v. Com.* 7 Met. 460; *Whart. Cr. Pl. & Pr.* § 213; *Whart. Crim. Law*, 8th ed. § 952.

⁸ *Hamblett v. State*, 18 N. H. 384; *State v. Goodrich*, 46 N. H. 186; *Com. v. Smith*, 1 Mass. 245; *Collins v. People*, 39 Ill. 223; *Low v. People*, 2 Park. C. R. 37.

leged in the aggregate, and the defendant may be convicted of stealing a part of less value than the whole, if there is anything on the record to attach to the articles on which the conviction was had a value sufficient to sustain the conviction.¹

VII. NEGATIVE AVERMENTS.

§ 128. Where, in a statute, an exception or proviso qualifies the description of the offence, the general rule is that the indictment should negative the exception or proviso.² In such cases, when the subject of the exception is peculiarly within the defendant's knowledge, and the negative cannot be proved by the prosecutor, the burden of proving the affirmative may be on the defendant, as a matter of defence.³ But another distinction is to be kept in mind. It may be that the negative to be established is something which virtually imputes certain positive conditions to the defendant, as on indictments for false pretences, where the charge of untruth is equivalent to a charge of falsity, in which case the burden of proving the negative is on the prosecution;⁴ and on an indictment for perjury, where to charge a defendant with swearing to a fact, not knowing it to be true, is equivalent to a charge of rash and false swearing, in which case the defendant's want of knowledge must also be shown by the prosecution. On the other hand, where the negative involves no criminality on the part of the defendant, then the burden may be on him to prove the affirmative. Thus the burden of proving the defendant to be a "traveller," under the statutes prohibiting wearing of concealed weapons, is on the defence.⁵

¹ *Com. v. O'Connell*, 12 Allen, 451; collected in Whart. Cr. Pl. & Pr. §§ 238 *et seq.* though see *Hamblett v. State*, 18 N. H. 384.

² See *infra*, § 341; *State v. McGlynn*, 34 N. H. 422.

³ 2 Hale, 171; 2 Hawk. c. 25, s. 112; 1 Chitty on Plead. 357; *State v. Gurney*, 37 Me. 149; *State v. Boyington*, 56 Me. 512; *State v. Barker*, 18 Vt. 195; *State v. Miller*, 24 Conn. 522. The authorities will be found

⁴ See Whart. Crim. Law, 8th ed. § 1165.

⁵ *Wiley v. State*, 52 Ind. 516. As to proof of license see more fully *infra*, § 343.

VIII. DIVISIBLE AVERMENTS.

§ 129. It is sufficient to prove so much of the indictment as shows the defendant to have been guilty of the substantive crime therein stated, though not to the full extent charged on him.¹ Divisibility of this class, as we shall presently see, may relate either to the subject, the object, or the predicate. When several defendants are charged, a verdict may be had as to any one of them, provided enough be left to constitute the offence. When several articles are alleged to have been stolen,² one can be separated from the other, and a verdict had for any one.³ The same divisibility applies to the averments of the mode of doing the unlawful thing, provided there be enough left to constitute the offence.⁴ The offence, however, of which the defendant is convicted, must at common law be of the same class as that with which he is charged.⁵ For instance, on an indictment for simple larceny there cannot be a conviction of receiving stolen goods.⁶

Defendant
may be
convicted
of part of
offence
charged.

§ 130. Where, as will be also hereafter seen, a minor offence is included in a greater, the defendant may be acquitted of the latter, and convicted of the former.⁷ The defendant, for instance, may be convicted of an assault on an indictment for assaulting an officer when in execution of his duty, and thereby obstructing public justice,⁸ and on an indictment for an assault with a felonious intent.⁹ On an indict-

May be
convicted
of minor
offence.

¹ *Infra*, § 144; *R. v. Hunt*, 2 Camp. 583; *O'Connell v. R.* 11 Cl. & Fin. 155; 1 Greenleaf on Ev. § 65; 1 Russ. on Crimes, 790; *Com. v. Hunt*, 4 Pick. 252; *Larned v. Com.* 12 Met. 240; *Murphy v. State*, 28 Miss. 638. See *State v. Lessing*, 16 Minn. 75; *State v. Robey*, 8 Nev. 312.

For a full discussion of this topic in relation to *autrefois acquit* see *infra*, §§ 584 *et seq.* As to differentia between major and minor see *infra*, § 144. As to the pleading of duplicity see Whart. Cr. Pl. & Pr. §§ 243 *et seq.*

² *Infra*, § 136.

³ *Infra*, §§ 132, 145.

⁴ *Infra*, §§ 430 *et seq.*

⁵ Whart. Cr. Pl. & Pr. § 461; *R. v. Evans*, 3 Stark. C. P. 35; *R. v. Westbeer*, 1 Leach, 12; 2 Str. 1133; *State v. Shoemaker*, 7 Mo. 177. *Infra*, §§ 134, 580.

⁶ *Ross v. State*, 1 Blackf. 391.

⁷ See *infra*, §§ 143, 144, 578 *et seq.*, 584; *R. v. Compton*, 3 C. & P. 418; Roscoe's Crim. Ev. p. 82; *R. v. Macally*, 9 Rep. 67 *b*; *R. v. Swan*, Foster, 104.

⁸ Dick. Sess. 351; *Com. v. Kirby*, 2 Cush. 577; *Larned v. Com.* 12 Met. 240.

⁹ See cases *infra*, §§ 143, 584; *R. v. Williams*, 1 Mood. C. C. 107.

ment for entering and breaking a dwelling-house in the daytime and stealing therein, one may be found guilty of stealing in the dwelling-house in the daytime, or only of stealing.¹ And in all cases of aggravated larceny the defendant may be convicted of the simple larceny.²

§ 131. Where, as in cases of perjury and of subornation of perjury, several distinct assignments of perjury are laid, the indictment will be sustained if any one of these be proved, if that, by itself, be sufficient to constitute the offence.³ So if on an indictment for obtaining goods on false pretences any one of the false pretences be shown, that one, being itself within the statute, and appearing to have been operative in inducing the prosecutor to part with his property, will be sufficient to support a conviction.⁴ Even proof of part of a pretence is sufficient, when it was through such part that the goods were obtained.⁵ On an indictment for blasphemy it is necessary to prove only one of the assignments ;⁶ on an indictment for treason the overt acts may, on the same principle, be divided.⁷

§ 132. As is elsewhere noticed, where there are several articles included in indictments for stealing, or for wrongfully obtaining money or goods, proof as to one is enough,⁸ supposing that such article has a specific valuation.⁹ Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling.¹⁰ An indictment for em-

¹ *Com. v. Hope*, 22 Pick. 1; *Larned v. Com.* 12 Met. 240; *Whart. Cr. Pl. & Pr.* §§ 243 *et seq.*

² *R. v. Beany*, R. & R. 416. *Infra*, §§ 584-5.

³ *R. v. Rhodes*, 4 Ld. Raym. 886; *R. v. Ady*, 7 C. & P. 140; 2 Camp. 138, 139; *Cro. C. C.* 7th ed. 622; *State v. Hascall*, 6 N. H. 358; *State v. Mills*, 17 Me. 211; *Com. v. Johns*, 6 Gray, 274. See *De Bernie v. State*, 19 Ala. 23; *Whart. Crim. Law*, 8th ed. § 1301.

⁴ *Ibid.*; *R. v. Hill*, R. & R. 190; *People v. Haynes*, 11 Wend. 557;

Whart. Crim. Law, 8th ed. §§ 1167, 1218, where other cases are given.

⁵ *R. v. Hill*, R. & R. 190.

⁶ *Com. v. Kneeland*, 20 Pick. 206.

⁷ *Foster C. L.* 194; *Whart. Crim. Law*, 8th ed. § 1806.

⁸ *Infra*, § 145; *Whart. Cr. Pl. & Pr.* §§ 252, 470; *Whart. Crim. Law*, 8th ed. § 948; *State v. Cameron*, 40 Vt. 555; *Com. v. Eastman*, 2 Gray, 76; *Com. v. Williams*, 2 Cush. 583; *Lorton v. State*, 7 Mo. 55; *People v. Wiley*, 3 Hill (N. Y.), 194.

⁹ *Whart. Crim. Law*, 8th ed. §§ 951 *et seq.*

¹⁰ *R. v. Burdett*, 1 Ld. Raym. 149. See *R. v. Carson*, R. & R. 303.

bezzling two bank notes of equal value is supported by proof of the embezzlement of one note only.¹ On an indictment for stealing over \$100, one may be convicted for stealing less than \$100.² And on an indictment for having in possession more than ten pieces of counterfeit coin, the defendant may be found guilty of having less than ten.³ And, as will be presently seen, other allegations as to the extent of the property which was the object of the offence are divisible.

§ 133. Overt acts in conspiracy may be divisible. Thus upon an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy to prevent one workman from working.⁴

And so of
divisible
objects in
conspiracy.

§ 134. Where an indictment contains divisible averments in the shape of predicates, as that the defendant "forged and caused to be forged," proof of either averment will be sufficient.⁵ And so a defendant may be convicted of printing and publishing a libel upon an indictment which charges him with composing, printing, and publishing.⁶ Proof of killing by one of several instruments averred, also, will sustain an indictment for homicide,⁷ and so of killing by inflicting one of several wounds.⁸

And so of
divisible
predicates.

§ 135. On the same reasoning, where two intentions are cumulatively ascribed to one act,⁹ as that an assault was committed upon a female, with intent to abuse and carnally know her, proof of either of these intentions

And so of
cumulative
intents.

¹ 1 Greenleaf on Ev. § 65; R. v. Carson, R. & R. 303; Furneaux's case, R. & R. 335; Tyer's case, R. & R. 402.

² Com. v. Griffin, 21 Pick. 523; Com. v. O'Connell, 12 Allen, 451. But some part of the notes or coin charged must be specifically proved. Supra, § 122.

³ Com. v. Griffin, 21 Pick. 523.

⁴ R. v. Bykerdyke, 1 M. & Rob. 179. Supra, § 131; Whart. Cr. Pl. & Pr. § 254.

⁵ R. v. Middlehurst, 1 Burr. 400; Hoskins v. State, 11 Ga. 92. Infra, §§ 138 et seq.; Whart. Crim. Law, 8th ed.

§ 727. As to verdict see Whart. Cr. Pl. & Pr. § 742.

⁶ R. v. Hunt, 2 Camp. 585; R. v. Williams, Ibid. 646; State v. Locklear, Busbee, 205; Com. v. Morgan, 107 Mass. 199; Whart. Cr. Pl. & Pr. § 742; Whart. Crim. Law, 8th ed. § 1663.

⁷ Beavers v. State, 58 Ind. 530. See Casey v. People, 72 N. Y. 393; State v. McDonald, 67 Mo. 13.

⁸ Whart. Crim. Law, 8th ed. § 535.

⁹ Infra, § 740; Whart. Crim. Law, 8th ed. §§ 108, 119; R. v. Dawson, 1 Eng. L. & Eq. 589; 3 Stark. 62; R. v. Hanson, 1 C. & M. 334; R. v. Cox, R. & R. 362; R. v. Davis, 1 C. & P. 306;

will be sufficient. So on an indictment charging the defendant with having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt, Bayley, J. informed the jury that if they were of opinion that the defendant had published the libel with *either* of those intentions they ought to find him guilty.¹

§ 136. Where two are charged with a joint and single offence, *e. g.* larceny, either may be found guilty; but they Defendants may be severally convicted. cannot be found guilty of separate parts of the charge; and if so found guilty separately a pardon must be obtained, or a *nolle prosequi* entered as to the one who stands second upon the indictment, before judgment can be given against the other.² But where several are indicted for burglary and larceny, one may be found guilty of the burglary and larceny, and the others of the larceny only.³ Where, however, the act is not joint, the English practice is to give judgment against the party who is proved to have committed the first felony and acquit the others.⁴

§ 137. By statutes now of almost universal adoption, the Divisibility extended by statute. common law rule in this respect has been largely extended. Thus, for instance, in Massachusetts, by force of statute, it is now held that on an indictment for rape, the prisoner may be convicted of incest, or assault and battery;⁵ and on an indictment for manslaughter, the defendant may be convicted of assault and battery.⁶ But it was held in a prior case, that on an indictment for murder there cannot at common law be a conviction of an assault with intent to murder.⁷ By statutes, in most jurisdictions, there may be now con-

R. v. Batt, 6 C. & P. 329; State v. Cook, 6 S. & R. 577; Whart. Cr. Pl. & Moore, 12 N. H. 42; Com. v. McPike, Pr. §§ 312, 755.

3 Cush. 181; People v. Curling, 1 R. v. Butterworth, R. & R. 520. Johns. 320; State v. Dineen, 10 Minn. Infra, §§ 584-5.

407; State v. Cocker, 3 Harring. 554. R. v. Dovey, 2 Den. C. C. 86; 2 Eng. L. & Eq. 532.

As to surplusage see infra, §§ 138 *et seq.* Com. v. Goodhue, 2 Met. 193; Com. v. Drum, 19 Pick. 479. See infra, §§ 584-5.

¹ R. v. Evans, 3 Stark. (N. P.) 85.

² R. v. Hemstead, R. & R. 344; O'Connell v. R. 11 Cl. & Fin. 155; Com. v. Wood, 12 Mass. 313; Com. v. Com. v. Drum, 19 Pick. 479. See infra, §§ 584-5.

⁷ Com. v. Roby, 12 Pick. 496.

victions of an attempt on indictments for the consummated offence.¹

IX. SURPLUSAGE.

§ 138. All unnecessary words may, on trial or arrest of judgment, be rejected as surplusage, if the indictment would be good upon striking them out.² Even an indictment on its face made defective by insensible or repugnant allegations may, by thus discharging phrases which destroy or pervert its meaning, in this way be made good; the noxious surplusage being discharged upon motion in arrest of judgment.³ Thus where an indictment alleged that the defendant, Francis Morris, the said goods above mentioned, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, he, the said Thomas Morris, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, carried away; the twelve judges held, that the words, "he, the said Thomas Morris," might be struck out as surplusage, and that the indictment was sensible and good without them.⁴ And again, where it was charged that the defendant made an assault on "Henry B.," and "him, the said William B., did beat," &c., "and other wrongs to the said William B. did," &c., "to the damage of the said William B.," the indictment was held good on arrest of judgment.⁵

¹ See Wh. Cr. Pl. & Pr. § 742.

² Supra, § 128; Leach, 536; R. v. Radley, 2 C. & K. 974; 1 Den. C. C. 450; 2 Russ. on Cr. 786; 1 T. R. 322; Com. Dig. Pleader, c. 28, 29, F. 12; 4 Co. 412; Mod. 327; R. v. Jennings, Dears. & B. 447; U. S. v. Howard, 3 Sumner, 12; State v. Noble, 3 Shep. 476; State v. Palmer, 35 Me. 9; State v. Bailey, 11 Foster, 521; Com v. Arnold, 4 Pick. 251; State v. Corrigan, 24 Conn. 286; People v. Lohman, 2 Barb. 216; People v. Casey, 72 N. Y. 393; Crichton v. People, 6 Parker C. R. 363; Phelps v. People, 72 N. Y. 334, 372; Jillard v. Com. 26 Penn. St. 170; State v. Cozens, 6 Ired. 82; State v. Coppenberg, 2 Strobb. 273;

State v. Brown, 8 Humph. 89; State v. Wilder, 7 Blackf. 582; State v. Smouse, 50 Iowa, 209; State v. Erickson, 45 Wis. 86; State v. Elliott, 14 Tex. 423. See, as to "Variance," supra, §§ 91 *et seq.*; and as to duplicity, supra, §§ 129 *et seq.*; and see fully Whart. Cr. Pl. & Pr. §§ 162-3, 195, 243 *et seq.*

³ R. v. Redman, 1 Leach, 477.

⁴ R. v. Morris, 1 Leach C. C. 109. See, for other misnomers rejected as surplusage, Com. v. Hunt, 4 Pick. 252; U. S. v. Howard, 3 Sumner, 12.

⁵ R. v. Crespín, 11 Q. B. 914; State v. Burt, 25 Vt. 373; Kennedy v. State, 62 Ind. 136.

§ 139. There can, it is well said, be no use in requiring proof of allegations which are impertinent; the identity of those allegations which are essential to the claim or charge, with the proof, is all that is material. Thus if it were alleged that A., being armed with a bludgeon, and disguised with a visor, feloniously stole, took, and carried away the watch of B., the allegations that A. was armed and disguised, being altogether foreign to a charge of larceny, could be wholly rejected, and would require no proof on the trial. So where an indictment for an assault and battery, with an intent to kill, stated that the defendant did bite or cut off the ear of the prosecutor, &c., it was held, that this being merely a circumstance collateral and impertinent, it could be stricken out.¹ And where an indictment for producing an abortion alleges that the person operated on subsequently died, this can be discharged as aggravation.²

§ 140. The averment of ownership may be stricken out when immaterial.³ Where in an indictment under the Act of Congress of 1825, c. 276, §§ 5, 22, the ownership of the vessel was alleged to be in William Nye and others, instead of Willard Nye and others, it was held that an allegation of the particular ownership was unnecessary and immaterial, and that the misnomer above mentioned was of no consequence; it being sufficient to allege that the owners were citizens of the United States.⁴ And where an indictment alleged a robbery to have been committed in the dwelling-house of A. B., it was held that a variance as to the owner's name was immaterial, as it was not essential to the crime of robbery that it should have been committed in a dwelling-house.⁵

§ 141. The object of a *videlicet* is to point out, in connection with a clause immediately preceding, a specification, which, if material, goes to sustain the indictment generally, and if immaterial, may be rejected as surplusage.⁶ The

¹ Scott v. Com. 6 S. & R. 224. To the same effect see Com. v. Randall, 4 Gray, 36; Ld. Churchill v. Hunt, 2 B. & A. 685.

² Com. v. Adams, 127 Mass. 15. See Lohman v. People, 1 Comst. 379.

³ Stevens v. Com. 4 Leigh, 683.

⁴ U. S. v. Howard, 3 Sumner, 12; State v. Cassety, 1 Rich. 91.

⁵ Pye's case, 1 East P. C. 785.

⁶ See Whart. Cr. Pl. & Pr. §§ 122, 158 a; 1 Stark. C. P. 251; R. v. Scott, D. & B. 47; Ryalls v. R. 11 Q. B. 781, 797; Com. v. Hart, 10 Gray,

effect of the introduction of the *videlicet* is to relieve the pleader from the necessity of proving a non-essential descriptive averment.¹ But it has been said in New York, "that when the indictment does not stop with the general charge, but proceeds under a *videlicet* to explain or render more certain by description, the description becomes a material part of the charge. It is the office of a *videlicet* to restrain or limit the generality of the preceding words, and in some instances to explain them. If what precedes be matter of direct averment, and material, then what is stated under the *videlicet* will be deemed material and traversable. . . . And if traversable they must be proved."²

§ 142. The same principle extends to cases where the evidence fails to prove circumstances not altogether impertinent, but which merely affect the magnitude or extent of the claim or charge; and here, although circumstances are alleged, which, if proved, would have been of legal importance, yet, although the evidence failed to establish the whole of what is alleged, the principle adverted to still operates to give effect to what is proved, to the extent to which it is proved. "The principles," remarks Mr. Starkie, "which require the cause of action or ground of offence to be stated, are satisfied: the adversary is not taken by surprise, for no fact is admitted in evidence which is not alleged against him; and the court is enabled to pronounce on the legal effect of the part which is established as true, by the verdict of the jury, and the record shows the real nature and extent of the right or liability established."³ Thus, where an indictment in one count charges a rescue, and also an assault and battery, and the defendant is convicted generally, if the averments as to the rescue are uncertain or bad, these may be rejected as superfluous and immaterial, and the court may proceed to pass judgment upon the verdict, as for an assault and battery.⁴ It has also been

Aggrava-
tion and
induce-
ment may
be dis-
charged.

468; *People v. Jackson*, 3 Denio, 101.

¹ 1 Greenl. Ev. § 60; 1 Ch. Pl. 317; *State v. Heck*, 23 Minn. 551.

² *People v. Jackson*, 3 Denio, 101. See *Crichton v. People*, 6 Parker C. R. 363; but see *Ryalls v. R.* 11 Q. B. 781.

³ Starkie on Ev. 1550, 1565; *U. S. v. Howard*, 3 Sumn. 12; *McCulley v. State*, 62 Ind. 428; *Cameron v. State*, 8 Eng. (Ark.) 712. And see *supra*, §§ 129-32.

⁴ *State v. Morrison*, 2 Ired. 9; *State v. Burt*, 25 Vt. 373; *Com. v. Randall*, 4 Gray, 36.

held that in an indictment charging an innholder with suffering persons "to play at cards and other unlawful games," the words "unlawful games" may be rejected as surplusage.¹

It has been ruled that if an indictment alleges facts which constitute a misdemeanor, it will be good for that offence, although it state other facts which go to constitute a felony, provided all the facts alleged fall short of the charge of felony, in consequence of some other facts essential to that charge, *e. g.* the intent of the party accused, not being averred. Thus when by statute it is a misdemeanor to administer drugs, &c., to a pregnant female, with intent to produce miscarriage; and by statute it is manslaughter to use the same means with intent to destroy the child in case the death of such child be thereby produced, an indictment charged all the facts necessary to constitute the crime of manslaughter, except the intent with which the acts were done, and in conclusion, it characterized the crime as manslaughter, but the only intent charged was an intent to produce a miscarriage; it was held that the indictment was defective for the felony, but good for the misdemeanor, and that the accused was properly convicted of the latter offence.² And in conformity with the view above stated, a carrier of the mail may be convicted of an offence punishable generally under the law, though not as carrier; and if he is charged in the indictment as carrier, the word "carrier" will be considered as an irrelevant description of his person, and as surplusage.³

§ 143. Essential obligations, however, cannot be rejected as surplusage. Thus where, in an indictment for obtaining money by false pretences, the false pretence stated was that the defendant said that he had paid a sum of money into the bank, and the proof was that he said a sum of money had been paid into the bank, without saying by whom; the defendant was acquitted for the variance, Lord Ellenborough holding that there was a difference in substance between the two assertions.⁴ It is otherwise, however, when the legal meaning of the acts is the same. Thus, in an indictment

¹ *Com. v. Bolkom*, 2 Pick. 281. See *Com. v. Arnold*, 4 Pick. 251.

² *Lohman v. People*, 1 Comst. 379. See *Com. v. Adams*, 127 Mass. 15.

³ *U. S. v. Burroughs*, 3 McLean, 405.

⁴ *R. v. Plestow*, 1 Camp. 494. See *State v. Clark*, 3 Foster (N. H.), 429.

for murder, an allegation that the death was produced with a knife will be supported by proof that it was produced by a dagger, sword, staff, or the like, or any instrument capable of the same effect.¹ Where a declaration under the bribery act alleged that the bribe was to induce White to vote for Mr. Lockyer and Lord Egmont, it was held to be sufficient to prove that the bribe was to give his vote for Mr. Lockyer.² And where the indictment charged the defendant with a nuisance in erecting a dam, by reason of which the animal and vegetable substances brought down the stream were collected and accumulated, and became offensive, &c., but the evidence showed that the nuisance was caused, not by the means described, but from the alternate rise and fall of water in the pond, or from the action of the sun on the vegetable matter on its margin; it was held there was no variance, the result and original cause being the same.³

§ 144. The same principle may also be used to explain the cases elsewhere referred to,⁴ in which a man charged with a greater offence may be convicted of one of lesser degree contained in it.⁵ Thus, if A. be charged with feloniously killing B. of malice prepense, and all but the fact of malice prepense be proved, A. may be convicted

Differentia
between
major and
minor
offence.

¹ *R. v. Mackalley*, 9 Co. 67 a; *Gilb. Ev.* 231; *Archbold P. C.* 9th ed. 382. *Supra*, § 91.

² *Combe v. Pitt*, 3 Burr. 1586.

³ *People v. Townsend*, 3 Hill, 479.

⁴ *Supra*, § 130; *infra*, §§ 584, 585.

⁵ *Supra*, § 131; *Whart. Crim. Law*, 8th ed. § 542; *Whart. Cr. Pl. & Pr.* §§ 244-6, 465; *R. v. Oliver*, 8 Cox C. C. 384; *Bell C. C.* 287; *R. v. Yeadon*, 9 Cox C. C. 91; *R. v. Mitchell*, 12 Eng. L. & Eq. 588; *State v. Waters*, 39 Me. 54; *State v. Dearborn*, 54 Me. 442; *State v. Hardy*, 47 N. H. 538; *State v. Coy*, 2 Aiken, 181; *State v. Burt*, 25 Vt. 373; *Keefe v. People*, 49 N. Y. 348; *State v. Johnson*, 1 Vroom, 185; *Francisco v. State*, 4 Zab. 80; *Hutchison v. Com.* 82 Penn. St. 472; *State v. Flannigan*, 6 Md. 167; *Davis*

v. State, 39 Md. 355; *Stewart v. State*, 5 Ohio, 242; *Wroe v. State*, 20 Oh. St. 460; *State v. Kennedy*, 7 Blackf. 233; *Foley v. State*, 9 Ind. 363; *Gillespie v. State*, 9 Ind. 380; *State v. Lessing*, 16 Minn. 75; *State v. Robey*, 8 Nev. 312; *Swinney v. State*, 8 S. & M. 576; *State v. Fleming*, 2 Strobb. 464; *Johnson v. State*, 14 Ga. 55; *Carpenter v. State*, 23 Ala. 84; *Watson v. State*, 5 Mo. 497; *Reynolds v. State*, 11 Tex. 120; *McBride v. State*, 2 Eng. (Ark.) 374; *Cameron v. State*, 13 Ark. 712.

In *State v. Robey*, 8 Nev. 312, it was held that an indictment charging an assault with intent to commit murder will sustain a conviction of an assault with a deadly weapon with an intent to inflict a bodily injury.

of manslaughter, for the indictment contains all the allegations essential to that charge.¹ Another illustration is that of assaults upon officers, assaults with battery, or assaults with felonious intent, where, as has been seen, all but the assault may be rejected as surplusage, and the defendant convicted of that alone.² And so of indictments for adultery, in which, when fornication is indictable, there can be convictions, it is said, for fornication.³ Again, an indictment charging that the defendant did "embezzle, steal, take, and carry away," will be good for larceny, the "embezzle," &c., being rejected as surplusage.⁴

§ 145. The same rule applies to allegations of number, quantity, and magnitude, where the proof, *pro tanto*, supports the claim or charge. Hence, as we have already seen, if a man be charged with stealing ten sovereigns, he may be convicted of stealing five.⁵

§ 146. An allegation in an indictment which describes, defines, qualifies, or limits a matter material to be charged, is a descriptive averment, and must be proved as laid, even though such particular description was unnecessary.⁶

¹ *Infra*, §§ 584-5.

² *Infra*, § 584-5; Whart. Crim. Law, 8th ed. § 641 a.

³ *Resp. v. Roberts*, 2 Dall. 124; *Com. v. Dinkey*, 17 Penn. St. 126; *State v. Cowell*, 4 Ired. 231; *contra*, *State v. Pearce*, 2 Blackf. 318; *Smitherman v. State*, 27 Ala. 23.

⁴ *Com. v. Simpson*, 9 Met. 138.

⁵ *Supra*, § 132; Whart. Crim. Law, 8th ed. § 951. As to verdict see Whart. Cr. Pl. & Pr. § 742.

In Massachusetts, one statute imposed one penalty on having ten or more counterfeit coins in possession, and another statute a penalty for having less than ten counterfeit coins in possession. The defendant was indicted for having in his possession more than ten pieces of counterfeit coins; the verdict found him guilty of having in his possession four pieces. It was contended that the verdict was in effect a verdict of not guilty, and that the jury could not find the de-

fendant guilty if he had a less number than ten pieces, for that was a distinct offence. But these objections were overruled by the court. Chief Justice Shaw, in delivering the opinion, said: "Although the general rule is that every material averment must be proved, yet it by no means follows that it is necessary to prove the offence charged to the whole extent laid. It is quite sufficient to prove so much of the charge as constitutes an offence punishable by law. . . . The substance of the crime, in the case before us, is the possession of counterfeit coins, with the guilty knowledge and intent indicated; and this is a substantive offence whether the number of pieces be over or under ten." The party was therefore found guilty of the offence stated though not to the extent laid in the indictment. *Com. v. Griffin*, 21 Pick. 523.

⁶ *U. S. v. Howard*, 3 Sumner, 12; *U. S. v. Brown*, 3 McLean, 238; *State*

Thus, in an indictment for resisting a deputy sheriff in the discharge of his duty, an averment that the sheriff was "legally appointed and duly qualified" is descriptive and must be proved; as in such case the whole averment of an assault upon a deputy sheriff cannot be omitted without affecting the charge against the prisoner.¹ And so also a description of the termini of a letter in an indictment for stealing it must be proved as laid.² So the misrecital of the names of persons connected with the offence may be fatal.³ On an indictment, also, for stealing a pine log marked with a particular mark, the mark must be proved as alleged, and the description cannot be rejected as surplusage,⁴ nor, on an indictment for cutting trees, can the specific description of the tree, though unnecessarily minute, be rejected.⁵ The same consequences follow from misreciting a public statute,⁶ and from unnecessarily but erroneously inserting the ownership of stolen goods.⁷

§ 147. Language merely formal may always be rejected. Thus, the words "then and there," in the concluding part of a charge against a person present abetting a murder, may be considered as surplusage, or referred to the act done, which caused the death, and not to the time and

Otherwise
as to formal
language.

v. Noble, 15 Me. 476; *U. S. v. Jackson*, 30 Me. 29; *State v. Lashus*, 67 Me. 567; *State v. Canney*, 19 N. H. 135; *State v. Langley*, 34 N. H. 529; *Com. v. Atwood*, 11 Mass. 93; *Com. v. Tuck*, 20 Pick. 356; *Com. v. Varney*, 10 Cush. 402; *Com. v. Livermore*, 4 Gray, 18; *Com. v. Dejardin*, 126 Mass. 46; *People v. Jones*, 5 Lansing, 340; *State v. Johnston*, 6 Jones (N. C.), 485; *Morgan v. State*, 61 Ind. 447. *Supra*, § 109. And as to descriptions of property see *supra*, §§ 121 *et seq.*

Under the Ohio statute, where an indictment charged the defendant with stealing a *silver* teapot, and other named articles of *silver* ware, and the evidence on the trial showed that the articles stolen were *plated* ware, consisting of only one twenty-fifth part silver, and there was no

finding of the court or evidence showing that the variance was material to the merits of the case, or prejudicial to the defendant, it was held that the variance was not fatal, and the defendant was properly convicted, there being a good legal description of the articles stolen after the false word "silver" is rejected. *Goodale v. State*, 22 Oh. St. 203.

¹ *State v. Copp*, 15 N. H. 212.

² *U. S. v. Foye*, 1 Curtis C. C. 364.

³ *State v. Weeks*, 30 Me. 182; *State v. Johnston*, 6 Jones (N. C.), 486. *Supra*, § 94.

⁴ *State v. Noble*, 15 Me. 476.

⁵ *Com. v. Butcher*, 4 Grat. 544.

⁶ *Com. Dig. Pl. C.* 29.

⁷ *R. v. Woolford*, 1 M. & Rob. 384 (*Patterson, J.*); *Com. v. King*, 9 Cush. 284. See *supra*, §§ 12, 140.

place of the death ;¹ and so of the words “ languishing did live,” in an indictment for murder.² The words “ *contra formam statuti*,” erroneously inserted in an indictment for a common law offence, may be rejected as surplusage.³ And the words “ goods and chattels,” when unnecessary, may be thus discharged.⁴

§ 148. The word “ feloniously ” cannot, at common law, be discharged as surplusage, so as to sustain a conviction for a misdemeanor on an indictment for a felony.⁵ But “Feloniously” may be so rejected. in some States this rule has been held to be no longer binding, the reasons for it having ceased;⁶ and in other States the change has been effected by statute.⁷

¹ State v. Fley, Rice’s Dig. 104; 2 Brev. 338.

² Com. v. Gable, 7 S. & R. 423; Penn. v. Bell, Addis. 171, 173.

³ State v. Buckman, 8 N. H. 203; State v. Gove, 34 N. H. 510; State v. Phelps, 11 Vt. 116; Com. v. Hoxey, 16 Mass. 385; Southworth v. State, 5 Conn. 325; Cruiser v. State, 3 Harr. 206.

⁴ R. v. Morris, 1 Leach C. C. 109; Com. v. Eastman, 2 Gray, 76; S. C., 4 Gray, 416.

⁵ R. v. Cross, 1 Ld. Raym. 711; 3 Salk. 193; 2 Hawk. c. 47, s. 6; R. v. Woodhall, 12 Cox C. C. 244; R. v.

Bird, 2 Den. C. C. 94; Com. v. Newell, 7 Mass. 245; State v. Kennedy, 7 Blackf. 233; Wright v. State, 5 Ind. 290, 527; Black v. State, 2 Md. 376; Barber v. State, S. C. Md. 1879; State v. Durham, 72 N. C. 447.

⁶ State v. Wheeler, 3 Vt. 334; State v. Scott, 24 Vt. 129; People v. White, 22 Wend. 175; Lohman v. People, 1 Comst. 379; State v. Johnson, 1 Vroom, 185; Hunter v. Com. 79 Penn. St. 503; State v. Hess, 5 Ohio, 1; State v. Gaffney, Rice, 431; Cameron v. State, 13 Ark. 712.

⁷ See Whart. Cr. Pl. & Pr. §§ 261, 742.

CHAPTER IV.

PRIMARINESS AS TO DOCUMENTS.

I. GENERAL RULE.

Secondary evidence of documents is inadmissible, § 152.

Record facts cannot be proved by parol, § 153.

Otherwise as to incidents collateral to records, § 154.

Of administrative records parol evidence is inadmissible, § 155.

Parol evidence not admissible on cross-examination, § 156.

Statutory designation of writings not necessarily exclusive, § 157.

Primary means immediate, § 158.

General test is not authority but immediateness, § 159.

No primary testimony is rejected because of faintness, § 160.

Written secondary evidence inadmissible, § 161.

Of telegrams original must be produced, § 162.

II. EXCEPTIONS TO RULE.

Rule does not apply where parol evidence is as primary as written, § 163.

Public officers' commissions need not be produced, § 164.

Nor charters of acting corporations, § 164 a.

So where the party charged admits the contents of the document, § 165.

Summaries of voluminous documents can be received, § 166.

So of parol evidence of things fleeting and unproducible, § 167.

So of documents which cannot be brought into court, § 168.

Statute may require marriage to be proved by record, § 169.

By private international law marriage may be proved by parol, § 170.

In charges of penal marriage strict proof is required, § 171.

In such cases foreign marriage not proved by uncorroborated confession, § 172.

Witness present may prove marriage, § 173.

Foreign certificate must be duly proved, § 173 a.

III. DIFFERENT KIND OF COPIES.

Secondary evidence of documents admits of degrees, § 174.

Photographic copies are secondary, § 175.

All printed impressions are of same grade, § 176.

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Examined copies must be compared, § 178.

Exemplifications made admissible by statute, § 179.

Statute does not exclude other proofs, § 181.

Only extends to court of record, § 182.

Statute must be strictly followed, § 183.

Office copy admitted when authorized by law, § 184.

Original records receivable in same court, § 185.

Office copies admissible in same State, § 186.

So of copies of records generally, § 187.

Seal of court essential to copy, § 188.

Of deeds, registry is admissible, § 189.

Ancient registries admissible without proof, § 190.

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Exemplification of recorded deeds admissible, § 192.

In such case subscribing witness need not be called, § 193.

When deeds are recorded in other States exemplifications must be under act of Congress, § 194.

Certificates inadmissible by common law; otherwise by statute, § 195.

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Copies of public documents receivable, § 198.

IV. SECONDARY EVIDENCE MAY BE RECEIVED WHEN PRIMARY IS UNPRODUCIBLE.

Lost or destroyed documents may be proved by parol, § 199.

So of papers out of power of party to produce, § 200.

Accidental destruction of paper does not forfeit this right, § 201.

Copies of copies inadmissible, § 202.

Abstracts and summaries when receivable, § 203.

So as to records, § 204.

Witness of lost document must be

sufficiently acquainted with original, § 205.

Court must be satisfied that original is non-producible and would be evidence if produced, § 206.

Loss may be inferentially proved, § 207.

Or by admission of opponent, § 208.

Probable custodian must be inquired of, § 209.

Search in proper places must be proved, § 210.

Third person in whose hands is document must be subpoenaed to produce, § 211.

V. SO WHEN DOCUMENT IS IN HANDS OF OPPOSITE PARTY.

Notice to produce is necessary when document is in hands of opposite party, § 212.

After refusal secondary evidence can be given, § 213.

Notice must be timely, § 214.

Notice to produce does not make a paper evidence, § 215.

Notice not necessary for document on which prosecution is brought, § 216.

Nor of notice to produce, § 217.

Collateral facts as to instrument may be proved without notice, § 218.

I. GENERAL RULE.

§ 152. OF documents that can be brought into court, secondary evidence is, as a rule, inadmissible. In some instances this exclusion may be based on a statutory limitation. In others it may be sustained on the ground that when a party desirous of expressing himself determines to put his views in writing, then the writing must itself be produced if the object be to exhibit his views. In all cases, however, the exclusion of secondary evidence of a producible document may be based on the ground that when a document can be obtained at first hand, it is against the policy of the law that it should be proved at second hand, through agencies by which it is open to greater or less misrepresentation.¹

¹ See Whart. Ev. § 60, for authorities to this point.

As cases where the same principle is acknowledged in criminal prosecutions see *R. v. Doran*, 1 Esp. 127; *R.*

v. Kitson, 1 Dears. C. C. 187; *R. v. O'Connell*, Arm. & T. 103; *R. v. Coppull*, 2 East, 25; *Com. v. James*, 1 Pick. 375; *Com. v. McPike*, 3 Cush. 181; *Com. v. Knison*, 9 Mass. 312.

§ 153. That which could be proved by record, we have first to observe, cannot ordinarily be proved by parol.¹ Thus the filing of a paper must be proved by the certificate of the clerk,² the discontinuance of an action must be proved by the record,³ a pardon must be proved by the warrant;⁴ a divorce must be proved by the decree.⁵ Parol evidence, cannot, therefore, be received of a binding over for a crime;⁶ of conviction of a crime;⁷ of a bastardy order;⁸ of the desertion of a soldier, of which there is an official record;⁹ of the action of a town meeting, of which a record is required to be kept;¹⁰ of the time of the terms of a court;¹¹ of a bankrupt discharge;¹² of the institution of suits;¹³ or of the character of the pleadings and docket proceedings.¹⁴ So, on an indictment for disturbing a Protestant congregation, Lord Kenyon ruled that

Record facts cannot be proved by parol.

Hence, the contents of a letter, written by a prisoner, cannot be testified to by a witness for the prosecution, unless it is shown that the letter is lost or destroyed, or is in the possession of the prisoner. *Dean v. Com.* 4 Grat. 541.

On an indictment for setting fire to a house with intent to defraud an insurance company, in order to prove that the house was insured the policy must be produced, as being the best evidence, and the insurance office cannot give any evidence from their books unless the absence of the policy is accounted for. *R. v. Doran*, 1 Esp. 127; *R. v. Kitson*, 1 Dears. C. C. 187; S. C., 22 L. J. M. C. 118.

¹ See Whart. on Ev. § 63, for cases. For authorities in criminal suits see *R. v. Hube*, Peake, 132; *State v. Thompson*, 19 Iowa, 299; *State v. Longineau*, 6 La. An. 700; *State v. Smith*, 12 La. An. 349; *State v. Edwards*, 19 Mo. 674.

² *Peterson v. Taylor*, 15 Ga. 483.

³ *Sheldon v. Frink*, 12 Pick. 568.

⁴ *Spalding v. Saxton*, 6 Watts, 338.

⁵ *Tice v. Reeves*, 30 N. J. L. 314.

⁶ *Smith v. Smith*, 43 N. H. 536.

⁷ *R. v. Dillon*, 14 Cox C. C. 4; *Clements v. Brooks*, 13 N. H. 92; *Com. v. Quinn*, 5 Gray, 478; *Com. v. Gallagher*, 126 Mass. 54; *Newcomb v. Griswold*, 24 N. Y. 298; *Peck v. Yorks*, 47 Barb. 131; *Farley v. State*, 57 Ind. 331; *Johnson v. State*, 48 Ga. 116; *People v. Reinhardt*, 39 Cal. 449; *State v. Rugan*, 68 Mo. 214. See next section as qualifying this. That a witness may be asked whether he has not been in prison see *infra*, § 474.

⁸ *Tyrrel v. Woodbridge*, 27 N. J. L. 416.

⁹ *Terrell v. Colebrook*, 35 Conn. 188; though see *Wilson v. McClure*, 50 Ill. 366. See Whart. on Ev. § 61.

¹⁰ *Cameron v. School Dist.* 42 Vt. 507.

¹¹ *Michener v. Lloyd*, 16 N. J. Eq. 38.

¹² *Regan v. Regan*, 72 N. C. 195.

¹³ *Sherman v. Smith*, 20 Ill. 350; *Hughes v. Christy*, 26 Tex. 230.

¹⁴ *Foster v. Trull*, 12 Johns. 456; *Harker v. Dement*, 9 Gill, 7; *Reilly v. Cavanagh*, 29 Ind. 435; *Milan v. Pemberton*, 12 Mo. 598; *Flynn v. Ins. Co.* 17 La. An. 135; *Gliddon v. Goos*, 21 La. An. 682.

the taking of the oaths under the Toleration Act, being matter of record, could not be proved by parol evidence.¹

§ 154. But incidents collateral to a record, when not of record, may be proved by parol.² Thus parol evidence has been held admissible to prove that two records relate to the same cause of action,³ though in such cases the records must first be put in evidence;⁴ to prove that a judgment was put in evidence in a former suit;⁵ to prove the alteration of a record;⁶ to prove attendance on court as a witness;⁷ to prove a *jurat* of town officers, in lack of record;⁸ to prove that a certain entry was not recorded;⁹ to prove that a particular person had been in prison;¹⁰ to prove the attendance of juries and of judges as parts of a trial;¹¹ and to prove that a bill before a grand jury was not ignored, but only continued.¹²

How far a record can be impeached will be considered in a following section.¹³

§ 155. Wherever a statute requires that a record of administrative acts should be kept by law, the same rule is applied. Hence, parol evidence of a person's enlistment in the service of the United States is not admissible.¹⁴

¹ *R. v. Hube, Peake*, 132. In *R. v. Rowland*, 1 F. & F. 72, Bramwell, B., held that on an indictment for perjury, in order to prove the proceedings of the county court, it was necessary to produce either the clerk's minutes, or a copy thereof bearing the seal of the court; the County Court Act (9 & 10 Vict. c. 95, s. 111) directing that such minutes should be kept, and that such minutes should be admissible.

² Whart. on Ev. § 64.

³ See *R. v. Bird*, 2 Den. C. C. 94; 5 Cox C. C. 20; *Perkins v. Walker*, 19 Vt. 144; *Com. v. Dellane*, 11 Gray, 67; *Com. v. Sutherland*, 109 Mass. 342; *Porter v. State*, 17 Ind. 415; *Duncan v. Com.* 6 Dana, 295; *State v. Andrews*, 27 Mo. 267; *State v. Scott*, 31 Mo. 121; *State v. Thornton*, 37 Mo. 360; *State v. De Witt*, 2 Hill (S. C.), 292; *State v. Matthews*, 9

Porter, 370. See fully *infra*, § 594, to the effect that parol evidence is admissible to identify or distinguish records.

⁴ *Webb v. Alexander*, 7 Wend. 281; *Inman v. Jenkins*, 3 Ohio, 271.

⁵ *Denny v. Moore*, 13 Ind. 418.

⁶ *Brier v. Woodbury*, 1 Pick. 362.

⁷ *Baker v. Brill*, 15 Johns. 260; *Brown v. Com.* 76 Penn. St. 319.

⁸ *Hathaway v. Addison*, 48 Me. 440.

⁹ *Infra*, §§ 166, 616.

¹⁰ *Infra*, § 474; *Real v. People*, 42 N. Y. 270; S. C., 55 Barb. 186; *Rathbun v. Ross*, 46 Barb. 127; *Howser v. Com.* 51 Penn. St. 332.

¹¹ *Massey v. Westcott*, 40 Ill. 160.

¹² *Knott v. Sargent*, 125 Mass. 95.

¹³ *Infra*, § 596 a.

¹⁴ *Atwood v. Winterport*, 60 Me. 250. See cases in Whart. Ev. § 65.

§ 156. Much interest has been felt on the question whether a witness, on cross-examination, can be examined as to the contents of a writing not yet in evidence and not placed in the witness's hands. In Queen Caroline's case, in 1820, it was substantially held that such cross-examination is not admissible.¹

Parol evidence of writings not admissible on cross-examination.

In this country the rule in Queen Caroline's case has been so far recognized as to preclude the proving, on cross-examination, by parol, a written instrument.² It has also been held that when a witness is cross-examined as to whether he wrote a letter containing certain statements, the writing must be first shown to the witness.³ Merely showing the letter to the witness is insufficient. He must have time to notice its contents.⁴

¹ Best's Evidence, § 473; 2 B. & B. 286; Whart. on Ev. § 68; and see a discussion of Queen Caroline's case, in this relation, in International Review for September, 1877.

The answers of the judges in Queen Caroline's case were condemned by the Common Law Commissioners of 1850, and at length reversed by the legislature. The 17 & 18 Vict. c. 125, s. 24, following almost verbatim the recommendation of those commissioners, enacts: "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided, always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." By sect. 103, the enactments in this section are ex-

tended to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, ss. 1 and 5, extends them to criminal cases.

² *Speyer v. Stern*, 2 Sweeny, 516; *Newcomb v. Griswold*, 24 N. Y. 298; *Gaffney v. People*, 50 N. Y. 415, cited *infra*.

³ *Stephens v. People*, 19 N. Y. 549; *Stamper v. Griffin*, 12 Ga. 450; *Callanan v. Shaw*, 24 Iowa, 441; *Cavanah v. State*, 56 Miss. 299. *Contra*, *Randolph v. Woodstock*, 35 Vt. 291.

⁴ *Morrison v. Myers*, 11 Iowa, 538.

"It is competent for a party on the trial to prove that a witness, on the part of his adversary, has made oral statements inconsistent with evidence upon a material question given by such witness on the trial, for the purpose of impeaching the credibility of a witness, and weakening the force of the evidence. But it is requisite that the party offering the impeaching evidence should first call the attention of the witness to the circumstances under which the statements were made, that he may have an opportunity of correcting the evidence given on the trial, or of explaining the apparent inconsistency between his evidence and his former state-

§ 157. It sometimes happens that a statute designates a certain kind of evidence as proof of certain facts, as in cases where a statute legitimates a particular kind of copy, or prescribes that having spirituous liquor on a counter in a public house shall be *prima facie* proof of selling. This designation, however, does not, unless it expressly so provides, exclude other proof of such facts.¹

§ 158. "Primary," in the sense now before us, means that which the parties whose rights are to be determined set forth as the final expression of their views. Thus there may be several preliminary drafts of an agreement to be executed, but only the agreement as executed is primary. And on an indictment for a libel in a newspaper, the original manuscript from which the paper is printed is secondary; and a written copy or reprint by third parties of the newspaper is secondary; the primary evidence, receivable as such, is the newspaper itself, as issued by the party whose liability is sought to be established.²

§ 159. The difficulties that have arisen in this connection are largely due to the ambiguity of the terms employed. Mr. Bentham³ distinguishes the two classes as "original" and "unoriginal;" which Mr. Best, though following in most points Mr. Bentham, changes into "original" and "derivative." To this, however, it may be objected that there is no evidence that is not in some sense "original;" none that is not in some sense "derivative."⁴ The distinction may be more properly rested on the relationship of the document in controversy to the person to whom it is imputed. If it sprang directly from him, then it is primary so far as to oral statements made by the witness; and when his evidence is sought to be impeached by written statements, alleged to have been made by him, the writing should be first produced, so that he may have an opportunity for inspection and examination. And as the writing is the best evidence of the statement made by the witness therein, questions as to the contents

are not ordinarily admissible. The Queen's case, 2 B. & B. 287; Newcomb v. Griswold, 24 N. Y. 298; Greenleaf on Evidence, § 463; 2 Phillips on Evidence, 962." Andrews, J., Gaffney v. People, 50 N. Y. 223.

¹ See Whart. on Ev. § 69, for cases.

² Brunswick v. Harmer, 14 Q. B. 185; R. v. Amphlit, 6 D. & R. 126; Bond v. Bank, 2 Ga. 92.

³ Rat. Jud. Ev. b. vi. c. iii.

⁴ See supra, §§ 5-11.

as he personally is concerned. If it was meant by him as merely provisional, to be merged in a subsequent paper, then it is secondary to such subsequent paper. If it is only imputable to him penally (as in cases of libel or false affidavits) when put in a specific shape, then it is only primary when put in such shape.

§ 160. A series of forged notes may be issued, some peculiarly distinct, others faint. If the forger be put on his trial for the manufacturing of forged paper, the faint note is as much primary evidence as is the distinct. In other words, that which constitutes the test of secondariness is, not inferiority as to distinctness, but removal, by the interposition of intelligent media, from the object to be proved. There may be several thousand sheets, to take another illustration, printed from the same type, and the last sheets printed may be blurred and confused; but on an indictment for a libel contained in the impression the last is as much an original as the first, and would be as admissible as the first; while a written copy made by an amanuensis from the first would be excluded, because secondary.¹ Hence comes the maxim, that secondariness goes not to conclusiveness but to grade. Secondary evidence is excluded not merely because it is inferior, but because it presupposes more direct and immediate evidence held back by the party offering.² We may extend these remarks to the relation between eye-witnesses with superior and those with inferior opportunities of observation. A mere stranger, for instance, is as admissible to testify to identity as is an intimate friend. So among witnesses standing on the same grade, one may be inferior to another as to trustworthiness, but this does not exclude him.³ The test is, "Do you testify at first hand?" If so, no matter how weak may be the impression on the mind of the person testifying, the testimony is receivable, so far as concerns the present test. Hence testimony of a mere bystander is primary evidence of a conversation he overhears, though not likely to be so accurate as that of a participant.⁴ The fact, also, that the alleged writer is not called as to the forgery of his signature, does not exclude other witnesses.⁵ An ordinary

No primary evidence is rejected because of its faintness.

¹ Bond v. Bank, 2 Ga. 92.

⁴ Peeples v. Smith, 8 Rich. 90.

² Infra, § 360. Whart. on Ev. § 72.

⁵ R. v. Hazy, 2 C. & P. 458; R. v. Hurley, 2 M. & Rob. 473; Smith v. Prescott, 17 Me. 277; Ainsworth v.

³ Infra, §§ 360, 549, 550.

observer, also, will be permitted to testify as to blood-stains, though experts were attainable who might have spoken more authoritatively ;¹ and on the same reasoning a non-expert may be received to prove insanity, though an expert might have been secured for this purpose.² To keep back, however, an intelligent eye-witness, and bring forward one of weak capacity, is always ground for suspicion; and as to documents, where secondary evidence, likely to be of high accuracy, is suppressed by a party, the court may refuse to permit him to produce evidence of an inferior type until the higher be accounted for.³ Hence if a party has a fac-simile of a lost paper, he cannot prove such paper by calling a witness as to its contents.⁴ A letter-book, however, in which press copies are taken, is held to be so far a copy as to stand in the same relation to the original as do copies taken from itself. The letter-book, and copies taken from it, are equally secondary.⁵

Written
secondary
evidence
inadmis-
sible.

§ 161. Hence copies of documents, under the limitations just expressed and elsewhere more fully noticed, are as inadmissible as are oral statements of their contents.⁶

Originals
of tele-
grams
must be
produced.

§ 162. Of a telegram, so far as concerns the criminal responsibility of the sender, the original message is the primary evidence, and must be duly proved as such ;⁷ and only on proof excusing its production can its contents be shown by parol.⁸ It has, however, been ruled that if the company is authorized by the sender to act for him (which is inferred from his sending a message over its lines), the message delivered is primary evidence as against the sender, in a suit by persons to whom such message is sent ;⁹ but if the receiver is

Greenlee, 1 Hawks, 190; McCaskle v. Amarine, 12 Ala. 17; Whart. on Ev. §§ 705-707.

¹ People v. Bell, 49 Cal. 486.

² Infra, § 417.

³ Whart. on Ev. §§ 72, 90.

⁴ Stevenson v. Hoy, 43 Penn. St. 191.

⁵ Whart. on Ev. §§ 72, 93; citing Goodrich v. Weston, 102 Mass. 363.

⁶ Whart. on Ev. § 73.

⁷ Lewis v. Havens, 40 Conn. 363.

⁸ Whart. on Ev. § 76; Scott & Jarn. on Tel. § 340; Howley v. Whipple, 48 N. H. 488; Durkee v. R. R. 29 Vt. 127; Com. v. Jeffries, 7 Allen, 548; Lewis v. Havens, 40 Conn. 363; Benford v. Sanner, 40 Penn. St. 9; West. Un. Tel. Co. v. Hopkins, 49 Ind. 223; Matteson v. Noyes, 25 Ill. 591; Williams v. Brickell, 37 Miss. 682; Richie v. Bass, 15 La. An. 668.

⁹ Morgan v. People, 59 Ill. 58. See Howley v. Whipple, 48 N. H. 487.

the employer, then the original message given by the sender to the operator must be produced.¹ A telegraphic answer to a letter may, with such letter, be used to prove a contract.² In such case, the telegram *as delivered* and acted on by the *receiver* becomes primary evidence of the contract.³ When there has been no previous communications between the parties, a telegram sent for the purpose of settling a particular detail is evidence only against the sender as to the particular point.⁴ Proof that the message was sent over the wires addressed to a particular person at a particular place, he being shown to be at the time resident at such a place, may present a *prima facie* case of the reception of such telegram by the sendee.⁵ But the sending of a telegram addressed to a person at a given place, and the receipt of an answer purporting to be from him in due course, is not admissible to prove that he was in the place at the time in question.⁶

II. EXCEPTIONS TO RULE.

§ 163. The first exception to be noticed is that which arises where parol evidence of a fact, of which there is a written memorandum, is from its nature as near to the thing testified to as is the writing.⁷ The date of A.'s birth, for instance, is registered by one of his parents; this is primary evidence. But the testimony of a relative cognizant of A.'s birth is also primary evidence of the fact.⁸ Marriage, as will hereafter be abundantly shown, may be proved by parol, though there be a written contract and a registry.⁹ Proof, again, of what is done at a legislative or corporate meeting is not excluded by the fact that the meeting kept minutes which may be evidence.¹⁰ The fact, also, that trains on a railroad are due at

Exceptions where parol evidence is as primary as written.

¹ Durkee v. R. R. 29 Vt. 127.

² Taylor v. Campbell, 20 Mo. 254; Whart. on Ev. § 618.

³ Dunning v. Roberts, 35 Barb. 463; Trevor v. Wood, 36 N. Y. 307.

⁴ Beach v. R. R. 37 N. Y. 457.

⁵ Com. v. Jeffries, 7 Allen, 548. See Whart. on Ev. §§ 1323-8-9.

⁶ Howley v. Whipple, 48 N. H. 487.

⁷ Whart. on Ev. § 77.

⁸ Evans v. Morgan, 2 C. & J. 453; R. v. Manwaring, Dears. & B. 132; Morris v. Miller, 4 Burr. 2057; Sussex Peerage, 11 Cl. & F. 85; Com. v. Norcross, 9 Mass. 492; Carskadden v. Poorman, 10 Watts, 82; Beeler v. Young, 3 Bibb, 520.

⁹ Infra, §§ 169, 170. See Limerick v. Limerick, 4 Sw. & Tr. 252.

¹⁰ Miles v. Bough, 3 Q. B. 848; Inglis v. R. R. 1 Macqueen, S. C. 112.

a certain point on a certain time may be proved by parol as well as by the time table.¹ It has also been held that the inscription on a trunk tag can be proved without producing the tag;² that a highway can be proved to be such without producing the deeds or record establishing it;³ that the nature of clothes can be proved without producing the clothes;⁴ that the fact that a witness has been in prison can be proved without producing the record of conviction.⁵ Parol evidence is also admissible of a license hanging on a wall, such license being put in evidence as a matter of description, for the purpose of identifying the building.⁶ The reason for these exceptions is, that when a document exists, not for the purpose of supplying specific words for limiting a thing, but for the purpose of giving a generic designation which can be equally proved by parol, then the parol proof is equally primary with the document.

§ 164. Proof that an individual has acted notoriously as a public officer is *prima facie* evidence of his official character, without producing his commission or appointment.⁷ It may also be proved by parol (there being nothing in the certificate to such effect) that a person

Authority
of public
officer may
be proved
by parol.

¹ Chicago R. R. v. George, 19 Ill. 510.

In suits for trover, for the conversion of a document, the document may be generally proved by parol description. Jolley v. Taylor, 1 Camp. 143; Scott v. Jones, 4 Taunt. 865.

² Com. v. Morrell, 99 Mass. 542.

³ Woburn v. Henshaw, 101 Mass. 193.

⁴ Com. v. Pope, 103 Mass. 440.

⁵ See *infra*, § 474; *supra*, § 154.

⁶ Com. v. Brown, 124 Mass. 318; citing Com. v. Powers, 116 Mass. 337.

It was proved, in a homicide case, that scrip of a particular issue, not then in circulation, was found the day after the murder in the house of the deceased, and that the defendant the same day passed similar scrip. The witness who found the scrip was asked to describe it. This was objected to,

on the ground that the scrip should be produced. The prosecution stated that the scrip would be produced. It was held that the witness was rightly allowed to describe it for the purpose of identifying the scrip when produced. Com. v. Sturtivant, 117 Mass. 122.

⁷ See *infra*, § 832; Berryman v. Wise, 4 T. R. 366; Doe v. Brawn, 5 B. & A. 243; McGahey v. Alston, 2 M. & W. 206; R. v. Roberts, 38 L. T. (N. S.) 690; 14 Cox C. C. 106; R. v. Gordon, 2 Leach, 581, 585, 586; R. v. Shelley, 2 Leach, 381; U. S. v. Reyburn, 6 Peters, 352, 367; Jacob v. U. S. 1 Brock. 520; Milnor v. Til- lotson, 7 Peters, 100, 101; Bank of U. S. v. Dandridge, 12 Wheat. 70; Cabot v. Given, 45 Me. 144; State v. Robert, 52 N. H. 492; Webber v. Davis, 5 Allen, 393; and see Whart. Crim. Law, 8th ed. §§ 1589, 1617, 1671.

taking an acknowledgment was a justice of the peace, or other proper officer;¹ and that certain persons were partners, without producing the articles.² So, as is elsewhere shown more fully, the fact of agency may be proved *prima facie* by recognition of the principal.³ But secondary proof of the contents of a letter of appointment cannot be received in evidence to establish the agency of a government agent, without first accounting for the non-production of the original.⁴

§ 164 *a*. The same rule has been extended to corporations, it being held unnecessary to prove the charter of a corporation acting and recognized generally as such.⁵ Whether the court will take judicial notice of a charter is elsewhere considered.⁶

And so of charter of corporation.

§ 165. A party, also, who admits a document to have certain contents, may relieve the opposite party from producing such document.⁷ And a defendant, who on cross-examination admits that he possessed or passed certain papers may make it unnecessary for the prosecution to put these papers in evidence.⁸ This is also the case with his answers as to prior imprisonments.⁹

Where the party charged admits the contents of the document.

§ 166. Of public documents, which public policy requires to be kept without removal in their archives, sworn abstracts, or summaries, as well as extracts, may be received.¹⁰ This liberty, however, is not allowed as to bank books, which must at common law be produced in court or their absence accounted for,¹¹ nor as to the books of a railroad company.¹² Nor can the certificate of an officer having

Summaries of voluminous documents may be received.

¹ *R. v. Howard*, 1 M. & R. 187; *Rhoades v. Selin*, 4 Wash. 715; *Shultz v. Moore*, 1 McLean, 520; *State v. McNally*, 34 Me. 210.

² *Alderson v. Clay*, 1 Stark. 405.

³ *Infra*, § 833.

⁴ *U. S. v. Boyd*, 5 How. 29.

⁵ *Calkins v. State*, 18 Oh. St. 236; *State v. Balt. & O. R. R.* 15 W. Va. 363; *State v. Thompson*, Sup. Ct. Kans. 1880, 21 Alb. L. J. 297; *Whart. Cr. Pl. & Pr.* § 111.

⁶ *Whart. on Ev.* §§ 292-3.

⁷ *Infra*, § 684.

⁸ *Infra*, §§ 430, 474.

⁹ *Infra*, § 474.

¹⁰ *Whart. on Ev.* § 80; *Roberts v. Doxon*, *Peake's Cas.* 83; *Meyer v. Sefton*, 2 Stark. 276; *Burton v. Drigga*, 20 Wall. 133; *Henderson v. Hackney*, 16 Ga. 521. See *Johnson v. Kershaw*, 1 De G. & Sm. 264, ruling that to admissibility of the abstract it is necessary that the books should be ready to be produced if required.

¹¹ *Ritchie v. Kinney*, 46 Mo. 298.

¹² *McCombs v. R. R.* 67 N. C. 193.

charge of public records, that a certain fact appears by the records, be received, as the records themselves must be proved or exemplified; ¹ though an officer may be called to prove that a certain entry is not in the docket.² And where a mass of private documents to be inquired into is so great that they cannot possibly be mastered in court, then, whenever a result can be ascertained by calculation, the result of such calculation, subject to be tested by other expert witnesses, is admissible.³

§ 167. Secondary evidence may also be given of documents so evanescent and transient that the incapacity of the party to produce them may be assumed without proof. Thus, without production, or explanation of non-production, witnesses have been permitted to give parol evidence of the inscriptions on banners exhibited at public meetings; ⁴ of the writing, as we have seen, on a trunk tag, at least for purposes of identification; ⁵ of a license hanging on a wall; ⁶ of the marks on clothes and other articles of personal property; ⁷ and of the marks on the heads of certain barrels, for the purpose of identifying them.⁸

§ 168. Unmovable structures, such as monuments or tombstones, with the inscriptions that are on them, may be proved either by photographs or by copies duly proved.⁹ In the same way proof may be made of marks on trees,¹⁰ of libels written on walls; ¹¹ of placards posted on walls.¹² It must appear, however, that the paper is so attached to the wall as to be irremovable.¹³ And the courts have admitted duly

¹ Wayland v. Ware, 109 Mass. 248. See Weidman v. Kohr, 4 S. & R. 174.

² McGrath v. Seagrave, 2 Allen, 448; Com. v. Evans, 101 Mass. 25. Infra, § 616.

³ Stephen's Ev. p. 70, citing Roberts v. Doxen, Peake, 88; Meyer v. Sefton, 2 Stark. 276.

⁴ R. v. Hunt, 3 B. & Ald. 566; Sheridan's case, 31 How. St. Tr. 679; R. v. O'Connell, Arm. & T. 235.

⁵ Com. v. Morrell, 99 Mass. 542.

⁶ Supra, § 163.

⁷ Com. v. Pope, 103 Mass. 440. See Com. v. Hills, 10 Cush. 530.

⁸ U. S. v. Graff, 14 Blatch. 381.

⁹ Jones v. Tarleton, 9 M. & W. 675; R. v. Fursey, 6 C. & P. 84; Doe v. Cole, 6 C. & P. 360; Haslam v. Cron, 19 W. R. 969; North Brookfield v. Warren, 16 Gray, 171. See Shrewsbury Peerage case, 7 H. L. C. 1, 16. Infra, § 545.

¹⁰ Ibid.

¹¹ Mortimer v. McCallen, 6 M. & W. 67.

¹² Bruce v. Nicolopulo, 11 Ex. 133. See Bartholomew v. Stephens, 8 C. & P. 728; Com. v. Brown, 124 Mass. 318.

¹³ Jones v. Tarleton, 9 M. & W. 675.

certified copies of papers in a country which forbids the removal of the originals ;¹ and in such cases abstracts of voluminous but unobtainable foreign documents may be received.²

§ 169. In ordinary cases, on the principle *locus regit actum*, a marriage must be contracted with the formalities prescribed in the country of solemnization ; and if these formalities are dispensed with, in a country where they are essential to the validity of the marriage, such marriage cannot extra-territorially be held valid.³ When the *lex fori* makes the record the proper evidence, then the record must be produced.⁴ Where, however, parties have lived together as man and wife in the United States, it will require very strong proof that their marriage was void for want of formality in the place of solemnization, to induce our courts, in a civil suit, to hold it invalid so as to render children illegitimate, or to stigmatize the union as adulterous.⁵ We may also hold that parties marrying in their domicil of origin, with the intention of settling in the United States, are subject to the law of their intended matrimonial domicil, and after they arrive in this country are to be regarded as man and wife, in cases where their marriage was solemnized in a way held sufficient in the place of such domicil.⁶ Nor, *a fortiori*, are we required to hold that marriages abroad of domiciled citizens of the United States are void unless solemnized with formalities requisite in the place of solemnization. It has indeed been argued with great ability by eminent jurists, that in such cases marriages void at the place of solemnization are void everywhere. This rule, as we have elsewhere seen, is open to serious doubt.⁷ Admitting it, however, does not invalidate marriages of domiciled Americans abroad when such marriages are not solemnized with the forms of the place of solemnization, since French and German courts of high authority have

Statute may require marriage to be proved by record.

¹ *Infra*, § 187; Whart. on Ev. § 83.

² Whart. on Ev. § 81.

³ See Whart. Conf. of L. §§ 127 *et seq.*; *Holmes v. Holmes*, 1 Abb. U. S. 526. Compare *infra*, §§ 530-3.

⁴ *Infra*, § 533; *State v. Horn*, 43 Vt. 20. See *State v. Wallace*, 9 N. H. 515; *Jackson v. People*, 2 Scam. 232; *Glenn v. Glenn*, 47 Ala. 204.

⁵ See Whart. Conf. of L. §§ 173 *et seq.*

⁶ See on this point the judicious remarks of Cooley, J., in *Hutchins v. Kimmell*, 31 Mich. 133. As adopting the views of the text see *London Law Mag.* 1878, 236; *Revue General du droit*, Sept. and Oct. 1877.

⁷ Whart. Conf. of L. § 171.

held that domiciled subjects of other States are to be governed, as to the capacity and forms of matrimony, by their own law. It is also to be remembered that in any view the *judex fori* will presume, until the contrary be proved, that a marriage abroad was in conformity with the *lex loci contractus*.¹

§ 170. It may happen that the *lex loci contractus* may prescribe that no marriage shall be valid unless solemnized and recorded in a particular way, and it may happen, also, that the *lex fori* may prescribe that in this respect the provisions of the *lex loci contractus* must be shown to have been satisfied, to prove a marriage. Except in such cases, which are not likely to occur, marriage may be proved by parol; and this is a rule of international law.² This parol proof may be resolved into several ingredients. It may consist of the testimony of witnesses present at the ceremony.³ It may consist of proof of cohabitation and admission;⁴ and, as has been elsewhere shown, cohabitation is an admission by acts. It does not follow, however, because parties cohabit as man and wife that they are actually married. It may be that the pretence that they are man and wife is a fraud, got up to cover an adulterous intercourse. It may be that the parties honestly believe that they have been legally married, but that such belief is founded on a mistake. It may be that the cohabitation was in a community in which the term marriage is applied loosely to sexual relations not strictly marital.⁵ As to reputation, also, when adduced to prove marriage, similar cautions may be suggested. Did the reputation take shape in a community jealous of marriage sanctity, and likely to repel any attempts to invade

¹ *Infra*, § 827; *R. v. Newton*, 2 M. & Rob. 505; *Com. v. Holt*, 121 Mass. 61; *Com. v. Jackson*, 11 Bush, 679; *Arnold v. State*, 53 Ga. 594; *Brown v. State*, 52 Ala. 338.

² Whart. Conf. of L. § 171; Whart. Crim. Law, 8th ed. § 1700 *et seq.*; *Com. v. Holt*, 121 Mass. 61; *Van Tuyl v. Van Tuyl*, 8 Abb. (N. Y.) Pr. N. S. 5; *S. C.*, 57 Barb. 235; *Bissell v. Bissell*, 55 Barb. 325; *Physick's Estate*, 2 Brewst. 179; *Guardians of the Poor v. Nathans*, 2 Brewst. 149;

Richard v. Brehm, 73 Penn. St. 140; *Ill. Land Co. v. Bonner*, 75 Ill. 315; *Murphy v. State*, 50 Ga. 150; *Dickerson v. Brown*, 49 Miss. 357; *Campbell v. Gullatt*, 43 Ala. 57; *Williams v. State*, 54 Ala. 131. See *Omohundro's Est.* 66 Penn. St. 113.

³ *Infra*, § 173.

⁴ Whart. Crim. Law, 8th ed. § 1700.

⁵ Presumptions from cohabitation are hereafter distinctively discussed, *infra*, § 827.

that sanctity? If so, reputation in such a community is of value, as showing that in the belief of the neighbors of the parties they were actually married. Still stronger does this proof become when it goes to show that the parties fitted into a compact and extended family system, in which the family relationships of the several members of a large group were reciprocally acknowledged as legitimate. In criminal issues, however, the latter form of proof is usually admissible only for collateral purposes, the marriage being proved by record or by eye-witnesses. But it is easy to conceive of cases in which the fact of marriage may be adequately proved by reputation, and by marital cohabitation, with the admissions it necessarily involves.¹

¹ See *Evans v. Morgan*, 2 C. & J. 453. For a special consideration of the topic in the text in connection with bigamy, the reader is referred to *Whart. Crim. Law*, 8th ed. §§ 1696 *et seq.*

In its international relations, the law of the solemnization of marriage may be thus stated:—

1. When a marriage by competent parties is proved to have been solemnized abroad, the presumption is that it was in accordance with the *lex loci contractus*.

2. The old common law of England, adopting in this respect the canon law, validates consensual marriages contracted by competent parties, irrespective of ecclesiastical benediction; and this law was brought to the United States by the English colonists, and became part of the common law of the English settled States.

3. Each sovereignty will maintain its distinctive policy as to marriage. France, for instance, as in *Jerome Bonaparte's* case, may decline to accept an American marriage as changing the *status* of one of her domiciled subjects. On the other hand, in the United States, we would hold such marriage binding, when validly solemnized within our borders, by parties whom

we regard competent. This is now settled in England to be the case when it is only by the law of the domicile of one of them that the marriage is invalid. But on reason and on authority, we must hold with Sir J. Hannen (*Sottomayer v. De Barros*, 41 L. T. 281), that even though by the court of the domicile of both parties the marriage is invalid, it would still be sustained by the courts of the State where the marriage is solemnized, where, by the laws of that State, the parties would have been capable of marriage if subjects.

Each sovereignty applying its distinctive policy, as has been said, to its subjects, the courts of domicile, should the parties return to it after contracting a marriage abroad, would hold the marriage invalid in all cases in which its own prohibition is based on national policy, or on national conception of morals, and not on matters of form. We may illustrate this by the English rulings as to the marriage of a man with his sister-in-law, and by our own rulings in cases of marriages of negroes with whites. In some States these marriages are void. There can be no question that domiciled citizens of States marrying in defiance of this prohibition in England would be re-

§ 171. An important distinction, however, is to be noticed between suits in which the legitimacy of children or the sanctity of the domestic relation is at issue, and those in which the effort is to impose on the defendant penalties attachable to an illegal marriage. In the first case we have in favor of the marriage the presumption of legitimacy,¹ as well as those of good faith,² and of regularity.³ In the second case we have against the marriage the presumption of innocence, as the marriage must be proved beyond reasona-

In cases charging a penal marriage stricter proof is required.

garded in England as validly married. There is no doubt that should they return, after the marriage, to their domicile, the courts of that domicile would hold the marriage invalid.

Nor does it follow that because a State requires certain conditions to validate marriages within its borders, the marriage of foreigners, within such borders, without complying with such conditions, would be held invalid by the courts of the domicile of the parties so marrying.

Undoubtedly this position has been disputed by high authority; but for it the following reasons may be given: *First*. In marriage, as has been said, each sovereignty is governed, as to matters involving state policy or morals, by its distinctive standards. *Secondly*. We have American rulings to this effect, holding that American citizens, marrying abroad, though without complying with requisites established by the law of the place of solemnization, will be regarded as lawfully married by the courts of their domicile if such marriage would have been valid if solemnized at such domicile. The examination of the recent rulings to this effect I must remand to the second edition of my book on Conflict of Laws. *Thirdly*. German and French courts, as has been stated in the text, have held that in such cases the *lex domicilii* is to control, and that if the marriage of Americans in Paris,

for instance, is in conformity with the laws of their domicile, though not in conformity with the law of France, it would be held good in France. If good in France, it would be regarded, even by those who insist upon the ubiquity of the *lex loci contractus*, as good in the United States.

For authorities on these points see Whart. Crim. Law, 8th ed. §§ 1698 *et seq.*

In Maryland it has been held, in deviation from the canon and common law, that a marriage contracted merely *per verba de praesenti* is not valid without some form of religious ceremony. *Denison v. Denison*, 35 Md. 361. See, however, for a more liberal view, *Barnum v. Barnum*, 42 Md. 251.

The right to prove marriages by parol is not affected by the statutes permitting parties to be called as witnesses. *Rockwell v. Tunnichiff*, 62 Barb. 408.

That the declarations of an ancestor can be received to establish marriage we will elsewhere see. *Infra*, § 233; Whart. on Ev. § 203.

That reputation without cohabitation cannot prove marriage see *Westfield v. Warren*, 3 Halst. 349; *Minor v. State*, 58 Ill. 59; *Buchanan v. State*, 58 Ala. 154.

¹ *Infra*, § 828.

² *Infra*, § 727.

³ *Infra*, § 829.

ble doubt.¹ We cannot, therefore, hold the decisions in the last class of cases binding on the former. In this country the distinction is of peculiar interest. An emigrant lands on our shores with a wife whom he has married without the observance of those restrictions which the distinctive social condition of several European States has imposed. He rears children whom he acknowledges, and who claim after his death to inherit his estate. Here, the validity of the marriage being in litigation, come in two important presumptions to sustain the legitimacy of the children. The first is that all acts are presumed to be regular until the contrary appears. The second is that when the evidence is equally balanced, the courts, in all questions of legitimacy, will favor the hypothesis of matrimony.² A different line of presumptions, however, apply when an emigrant comes to this country without a wife, marries here, establishes a home and family, and then is arrested here on the charge of bigamy, based on an alleged prior marriage in his native land. If, in such case, he should be charged with bigamy in contracting the second marriage, the prosecution, instead of being aided by presumptions which in a doubtful case would turn the scales in its favor, has to encounter presumptions which in a doubtful case will turn the scales against it. The defendant's second marriage is not contested, and is looked on with peculiar favor by the judicial polity of a country such as this, which seeks to encourage family growth.³ But what is more important, the fact of the first marriage is the gist of the prosecution's case, and to it applies eminently the maxim, that the charge of guilt, to justify a conviction, must be made out beyond reasonable doubt. Hence we find courts which are ready, when a marriage is to be adjudicated on its civil relations, to regard the husband's own admissions as proof of the fact, shrinking from this conclusion when the object is to sustain a criminal prosecution against him for bigamy. Confessions are only authoritative, it is well argued, when there is clear proof of the *corpus delicti*; and here the *corpus delicti* is the alleged first marriage.⁴ How is this to be

¹ See *Squire v. State*, 46 Ind. 459; *Com. v. Jackson*, 11 Bush, 679.

² See *Patterson v. Gaines*, 6 How. U. S. 550; *Shaffer v. State*, 20 Ohio, 3. *Infra*, § 828.

³ See *Whart. Confl. of L.* § 150.

⁴ *Infra*, § 633.

That confessions may be received as competent proof of marriage in those States in which record proof is not made requisite, see *R. v. Simmonsto*,

“clearly proved,” independent of the defendant’s confession? Now, in view of the issue being criminal, we can easily understand how a court should say, as some courts have said: “The *lex loci contractus* prescribes certain solemnities as necessary to constitute the formalities of marriage, and therefore, in view of the maxim, ‘*locus regit actum*,’ we must hold that any other proof of the fact of marriage is but secondary, and is not to be received.” Had the first wife been brought to this country, and here acknowledged, the case would have been different. But when the prosecution rests simply on a technical first marriage, it is not inconsistent in courts, who recognize the validity of a consensual marriage, to hold that such technical first marriage should, in a criminal issue, in order to be made out beyond reasonable doubt, be proved in the way the *lex loci contractus* prescribes, and that secondary evidence should only be received when the prescriptions of the *lex loci contractus* are peculiarly onerous, or when the primary evidence cannot be obtained.¹

§ 172. Confessions of marriage, it should be remembered, are of two kinds: (1.) Those incidental to cohabitation; and (2.) Those not so incidental. As to the latter (*e. g.* when a man cohabiting with a woman to whom he has been married in due form admits that he was previously married to another woman still living), they should be regarded as insufficient to sustain a conviction without proof *aliunde* of the fact of the first marriage.² But to the

When the contested marriage is foreign, confession should be corroborated.

1 C. & K. 164; Trumman’s case, East P. C. 470; R. v. Upton, 1 C. & K. 55; Cayford’s case, 7 Greenl. 57; State v. Hodgskins, 19 Me. 155; State v. Libbey, 44 Me. 469; Com. v. Holt, 121 Mass. 61; State v. Lash, 1 Harr. (N. J.) 380; Com. v. Murtagh, 1 Ashm. 272; Wolverton v. State, 16 Ohio, 178; Carmichael v. State, 12 Oh. St. 553; Jackson v. People, 2 Scam. 231; State v. Seals, 16 Ind. 352; Squire v. State, 46 Ind. 459; State v. Sanders, 30 Iowa, 582; Warner’s case, 2 Va. Cas. 95; O’Neale v. Com. 17 Grat. 582; State v. Hilton, 3 Rich. 424; State v. Britton, 4 McCord, 256; Cook v. State, 11 Ga. 53; Cameron v.

State, 14 Ala. 546; Langtry v. State, 30 Ala. 536; Williams v. State, 54 Ala. 131; Robinson v. Com. 6 Bush, 309; Com. v. Jackson, 11 Bush, 679; Gorman v. State, 23 Tex. 640.

But where the confession is without proof of *corpus delicti*, it will not sustain a conviction. Dove v. State, 3 Heisk. 760; Weinberg v. State, 25 Wis. 370; R. v. Savage, 13 Cox C. C. 178; overruling R. v. Newton, 2 M. & R. 503.

¹ Whart. on Ev. § 85; R. v. Savage, 13 Cox C. C. 178.

² As to scrutiny to be applied to confessions see *infra*, § 623; R. v. Flaherty, 2 C. & K. 782; Ham’s case,

first class of cases (those in which the admission is incidental to cohabitation) other considerations apply. Such admissions, in connection with cohabitation as man and wife, are abundant proof of marriage, with the limitations to be hereafter noticed.¹ It should also be noticed that if a man, after a consensual marriage in a country where consensual marriages are invalid, comes with his wife to a country where they are valid, and there lives with her as her husband, then this may be held a validation of the former invalid marriage. But if he leave her abroad, without such validation, then a court in our own land, should a prosecution be brought against him for bigamy, may well refuse to be satisfied by mere confessions, or even by proof of prior cohabitation. There must be proof in such case, to sustain the allegation of the indictment, of the solemnization of the first marriage.² We may not insist upon proof that all the prescriptions of the *lex loci contractus* were complied with; for these are sometimes so contrary to our national policy, and so repugnant to the common law of Christendom, that there may be cases in which we may refuse to recognize them as limiting an international institution such as marriage really is. But while we may thus occasionally dispense with these formalities, we must, nevertheless, insist, when a foreign marriage is made the basis of a criminal prosecution in our own land, that such foreign marriage should be proved by showing that in such marriage there was a *bonâ fide* matrimonial contract by parties capable of contracting, followed by cohabitation.³

² Fairf. 391; Com. v. Littlejohn, 15 Mass. 163; State v. Roswell, 6 Conn. 446; People v. Humphrey, 7 Johns. 314; Clayton v. Wardell, 4 Comst. 230; Gahagan v. People, 1 Parker C. R. 383; State v. Armstrong, 4 Minn. 335; People v. McCormack, 4 Parker C. R. 17; Green v. State, 59 Ala. 68.

In Massachusetts it is now provided by statute that circumstantial and presumptive evidence may be received to prove the fact of marriage. Suppl. Rev. Stat. 166-7, 184; Com. v. Johnson, 10 Allen, 196.

Where a slave was married before his emancipation, and subsequently continues to live and cohabit with his

wife, this amounts to a legal marriage, and a second marriage is bigamy. McReynolds v. State, 5 Cold. (Tenn.) 18. See Whart. Crim. Law, 8th ed. § 1686, and notes.

¹ See *infra*, §§ 623 *et seq.*, 686, 827. In Com. v. Holt, 121 Mass. 61, it was held that in prosecutions for adultery confession and reputation might prove marriage.

² But see Com. v. Jackson, 11 Bush, 679; State v. Hilton, 3. Rich. S. C. 434; Williams v. State, 54 Ala. 131; Carotti v. State, 42 Miss. 344.

³ *Infra*, § 530. See State v. Horn, 43 Vt. 20; People v. Humphrey, 7 Johns. 314; Weinberg v. State, 25

To establish the contract, the foreign registry, sustained by proof of the foreign law, is the best evidence,¹ wherever such foreign law, requiring a registry, is put in evidence. If, however, there be no proof of such foreign law, then the presumption is that consensual marriages are valid by the *lex loci contractus*; and, as has been seen, such marriages may be proved by parol, *e. g.* by proof of admissions, of cohabitation,² and of reputation, as well as by the testimony of witnesses present, as will be seen in the next section.³

§ 173. The testimony of a witness, present at the marriage, is ordinarily admissible and adequate proof, unless the law requires official evidence.⁴ When the marriage is extra-territorial, the officiating clergyman, according to American cases, may not only prove the marriage, but the foreign law under which it was solemnized.⁵ But in England, unless a witness be an expert, he cannot prove in this respect the foreign law.⁶ In domestic marriages, the fact that a justice of the peace or clergyman performed the ceremony is proof that he professed and was generally understood to have the authority so to do,⁷ and it will be presumed that the formal requisites of the ceremony were complied with.⁸ Whether the wife can be a witness is hereafter discussed.⁹

Wis. 370; *Bird v. Com.* 21 Grat. 800. See, in a civil issue, *Harris v. Cooper*, 31 Up. Can. Q. B. 182.

¹ *Bird v. Com.* 21 Grat. 800.

² Whart. on Ev. § 86. *Infra*, § 686.

³ *Com. v. Holt*, 121 Mass. 61; *Redgrave v. Redgrave*, 38 Md. 93; *Squire v. State*, 46 Ind. 459; *Com. v. Jackson*, 11 Bush, 679; *Brown v. State*, 52 Ala. 338; *Arnold v. State*, 53 Ga. 594. As to this presumption see *infra*, §§ 827 *et seq.*

⁴ *R. v. Manwaring*, D. & B. C. C. 132; 7 Cox C. C. 192; *State v. Kean*, 10 N. H. 347; *State v. Clark*, 54 N. H. 446; *Com. v. Putnam*, 1 Pick. 136; *Warner v. Com.* 2 Va. Cas. 95; *Wolverton v. State*, 16 Ohio, 176, and other cases cited Whart. Crim. Law, 8th ed. § 1701.

⁵ *Bird v. Com.* 21 Grat. 800; Am.

Life & Trust Co. v. Rosenagle, 77 Penn. St. 507; *State v. Abbey*, 29 Vt. 60; *State v. Goodrich*, 14 W. Va. 851.

⁶ *R. v. Povey*, 6 Cox C. C. 83; S. P., *R. v. Smith*, 14 Up. Can. Q. B. 565; but see Whart. Conf. of L. § 775, and *Sussex Peerage* case, there cited; and see fully Whart. on Ev. § 300.

⁷ *Infra*, § 827; *Bird v. Com.* 21 Grat. 800; *State v. Abbey*, 29 Vt. 60.

⁸ *Infra*, § 827.

⁹ See *infra*, §§ 380 *et seq.*

In *State v. Rowe*, 61 Me. 171, it was held that testimony of the *particeps criminis*, that she was "married two years ago by C. L. at his house," it not appearing that C. L. professed to be "a justice of the peace or an ordained or licensed minister of the gospel," or that the marriage was "consummated with a full belief on

§ 173 *a*. When the prosecution relies on a foreign certificate of marriage, such certificate will not be received, unless, (1.) The record be shown to have been kept in conformity with law; (2.) The authority and identity of the registrar be established; (3.) The certificate be authorized by and in conformity with the law of the place from which it emanates; and (4.) The signature be duly proved.¹

Foreign
certificate
must be
duly
proved.

III. DIFFERENT KINDS OF COPIES.

§ 174. Although the question is still regarded as open, the conclusion seems reasonable that a party who has in his power evidence of a higher degree throws much suspicion on his case if he withhold such higher evidence, and offer that which is not only lower, but necessarily inferior as a means of expressing truth, although such evidence may be technically of the same grade.² We may illustrate this principle by the circumstance that it has been held that if an exemplification of a lost record or deed be obtainable, a party will not be permitted to prove such deed or record by memory of witnesses.³ Hence a party cannot prove a record by parol when he has an opportunity to obtain an exemplification.⁴ The principle is that where a particular kind of copy is by law

Secondary
evidence of
documents
admits of
degrees.

the part of either of the persons married, that they were lawfully married," is not sufficient evidence of a marriage in an indictment for adultery.

¹ *Infra*, § 530-3; *State v. Dooris*, 40 Conn. 145. See *State v. Wallace*, 9 N. H. 515; *State v. Horn*, 48 Vt. 20.

In *State v. Dooris*, *ut supra*, for the purpose of proving the first marriage in a prosecution for bigamy, the State offered in evidence a document purporting to be a copy of an entry in the "Marriage Register Book" in the office of the Superintendent Registrar of Births, Marriages, and Deaths for the district of M., in Ireland, that the prisoner was, on a day stated, married to the alleged first wife; the entry containing the signatures of the officiating priest, the parties, and two

witnesses; and the copy being certified as such by T. W. in his official capacity as Superintendent Registrar for the district of M. It was ruled that the document was inadmissible: because (1.) it did not appear that the keeping of such a book was required by law; nor (2.) that T. W. was in fact the superintendent registrar; nor (3.) that his signature was genuine, if he was such officer.

The original certificate of marriage by the officiating clergyman is not admissible unless the handwriting be proved, when such proof is attainable. *State v. Colby*, 51 Vt. 291.

A copy of the town record is inadmissible unless ample. *Ibid*.

² Whart. on Ev. § 90.

³ *Ibid*.

⁴ *Ibid*. See *infra*, § 202.

especially directed and guarded, such a copy is to be regarded as so far primary as to exclude, so long as it can be produced, mere recollections by unofficial persons of what is registered in the copy.¹ But unless a particular kind of copy, either by statute or common law, or by peculiar reasons of policy, is made primary, the fact that it is withheld, however much it may detract from the credit of a party,² does not preclude him from offering other secondary evidence. The testimony, also, of a deceased witness can be proved either by notes of a short-hand writer sworn to by him, or by the recollection of a witness, or by an official reporter, if such be appointed by statute;³ and the validation of one of these modes of proof does not exclude the other. So it has been even argued that a party is not precluded from proving a lost document, by the fact that he has possession of a written copy of such document which could be verified.⁴

§ 175. Wherever the original can be produced, a photographic copy is inadmissible; though when the original is non-producible, such copies are of high value.⁵ And photographic copies are admissible for the purpose of distinguishing or identifying the original.⁶

§ 176. When the object is to prove a manuscript (as distinguished from a printed publication), the original must be produced or accounted for.⁷ But the several printed copies produced by a single impression, and issued in a single edition, come in *pari passu*. If the published sheet (as in prosecutions for libel) be the object of proof, all impressions are admissible. If they be offered as secondary evidence of the original, they are primary as to each other.⁸

§ 177. A press copy, also, is secondary to the original document from which it is taken,⁹ and is receivable on the loss of the original.¹⁰ Being only secondary, a copy can be produced from a press copy of a lost writing

¹ See *R. v. Wylde*, 6 C. & P. 380.

² Whart. on Ev. § 1266; and see *Shoenberger v. Hackman*, 37 Penn. St. 87.

³ *Infra*, § 231.

⁴ See Whart. on Ev. §§ 90, 177. *Infra*, §§ 227, 231.

⁵ *Infra*, §§ 544-5, 805.

⁶ *Infra*, §§ 415, 545, 805.

⁷ *R. v. Watson*, 32 How. St. Tr. 82. See *supra*, § 162.

⁸ *R. v. Ellicombe*, 5 C. & P. 522; *R. v. Kitson*, Pearce & D. 187; *R. v. Doran*, 1 Esp. 129. See *supra*, §§ 159, 160.

⁹ Whart. on Ev. §§ 92, 133.

¹⁰ *Cameron v. Peck*, 37 Conn. 555.

without producing the press copy.¹ But though a press copy is thus secondary, it may be used as a means of determining the identity and genuineness of an instrument.²

§ 178. According to the English practice, an examined copy, to be admissible, must be verified by a witness, who will swear that he has compared the copy tendered with the original, either directly, or through a person employed to read the original.³ A copy made by a witness, though without comparison, is undoubtedly evidence of a high grade, if he testifies to its accuracy; the more cautious course is to add comparison by another's aid.⁴ The copy, to be admissible, must be complete; and it will be excluded if it give abbreviations of that which in the original is given at length.⁵

Examined
copies
must be
compared.

§ 179. The Act of Congress of May 26, 1790, provides that "the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."⁶

Exempli-
fications
made ad-
missible by
federal
statute.

§ 180. Although by the terms of the original statute it is limited to state courts, it is extended, by the Act of March 27, 1804, to the "public acts, records, office books, judicial proceedings, courts, and officers of the respective territories of the United States, and countries subject to the jurisdiction of the United States," and it has been held that while the statute is not for-

¹ *Goodrich v. Weston*, 102 Mass. 362. See *supra*, § 160.

² *Com. v. Jeffries*, 7 Allen, 561.

³ See details of practice in Whart. on Ev. § 95.

⁴ "The general rule of the law upon this subject requires that a copy, in order to be admitted as secondary evidence, should be proved by some one who has compared it with the

original. 1 Starkie on Ev. 270, 9th Amer. ed.; *Kerns v. Swope*, 2 Watts, 75." *Sharswood, J., McGinniss v. Sawyer*, 63 Penn. St. 267.

⁵ *R. v. Christian*, C. & M. 388; *Com. v. Trout*, 76 Penn. St. 379.

⁶ See, as to rulings as to the character of exemplifications under this statute, Whart. on Ev. § 824.

mally applicable to the federal courts, yet exemplifications of the records of such courts will be regarded as admissible when the prescriptions of the statute are followed.¹

§ 181. The federal statute, while making it obligatory on state courts, under the federal Constitution, to accept exemplifications proved in accordance with its provisions, does not preclude a State from authorizing records of other States to be received in evidence on proof of less stringency, or on common law proof. The act does not say that records shall only be received upon such proof; it merely says that when verified by such proof they shall be received.² A federal court sitting in a particular State will accept the proof prescribed in such State of intra-territorial records.³ And it has been held that a state court may receive records of federal courts upon an ordinary exemplification.⁴

§ 182. Only courts of record are within the statute.⁵ It does not, therefore, include the proceedings of municipal magistrates or justices of the peace who keep no records;⁶ though it is otherwise when the justice of the peace holds a court of record, and is obliged by statute to keep a record of his proceedings;⁷ or when his proceedings are certified by him to the county court, and there verified under the statute.

§ 183. It is essential that the clerk, who under the act is to attest the record, should be the chief clerk of the court or of its successor, to whom the care of its records, in case of its expiration, is committed. The certificate of an under clerk, or of a deputy or substitute, is inadequate.⁸

§ 184. An "office copy" of a record is a copy made by an officer duly authorized for the purpose either by rule of court or by statute. Such copy, when the officer is authorized only by rule of court, is admissible as evidence in the *same court* and in the *same cause*; but, at common law, the copy must be proved to be correct, if it be

¹ Whart. on Ev. § 98.

² Ibid.

³ Ibid.

⁴ *Womack v. Dearman*, 7 Porter, 513.

⁵ See Brightly's Federal Digest, 265.

⁶ Whart. on Ev. § 99.

⁷ Ibid.

⁸ Whart. on Ev. § 100.

produced, either in another court, or even in the same court in another cause.¹

§ 185. When on a pending trial the records of the court trying the case are relevant, they may be admitted without further proof than is given by their production by the clerk from the proper archives.² We have also authority to the effect that the original papers in an inferior court may be received in evidence in a superior court.³ But the genuineness of the paper must be proved as a condition precedent to its reception.⁴

Original records of court in which suit is pending are evidence in such court.

§ 186. A copy, certified to be correct by the clerk or proper officer of the court where the record is deposited, will usually be received in evidence as *prima facie* proof of the record in the State by which the court is constituted; nor is it necessary that the certificate of the judge should be appended.⁵ The same decision has been reached where the copy and the certificate are by the judge and not the clerk of the court.⁶ But the certificate to the verity of the transcript must be explicit.⁷

Office copies admissible in same State.

§ 187. When the removal of the originals from their proper archives is refused, or is productive of great public inconvenience, there is a growing tendency, even at common law, to permit the records to be represented by exemplifications or by other authenticated copies.⁸ The document, however, must be of a character technically public.⁹

This rule extended to copies of records generally.

§ 188. In ordinary practice, the seal of a court of record is an essential to the attestation of the court of the accuracy of copies from its records.¹⁰ The seal proves itself.¹¹ In Massachusetts, however, it has been held that it is sufficient for the clerk of the court to attest a copy

Seal of court essential to copy.

¹ Den v. Fulford, 2 Burr. 1179; Jack v. Kiernan, 2 Jebb & Sy. 231. See also Barron v. Daniel, Craw. & D. 283.

² Whart. on Ev. § 106.

³ State v. Bartlett, 47 Me. 396; and other cases cited Whart. on Ev. § 106.

⁴ Perry v. May, 1 Hill (S. C.), 76.

⁵ State v. Bartlett, 47 Me. 396; and other cases cited in Whart. on Ev. § 107.

⁶ Brackett v. Hoitt, 20 N. H. 257.

⁷ Lyon v. Bolling, 14 Ala. 753.

⁸ See Whart. on Ev. § 108.

⁹ See infra, § 198; supra, § 167.

¹⁰ Whart. on Ev. § 109.

¹¹ Whart. on Ev. §§ 318-21, 695.

without attaching the seal of the court.¹ And in England, an ancient exemplification has been received without a seal.²

Registry of deed admissible. § 189. Statutes authorizing the recording of deeds or other instruments ordinarily make the book in which the registry is made admissible as evidence. Where it is not made so admissible, then, in order to enable such book to be put in evidence, the usual foundation accounting for the non-production of the original must be laid.³

Ancient registries admissible without proof. § 190. Proof of execution is not exacted in cases of ancient deeds when accompanied with thirty years' possession; of ancient registries, and of ancient maps, establishing boundaries, so as to cure irregularity of authentication.⁴

Certified copy of official register receivable. § 191. Even at common law it has been the practice, in consequence of the inconvenience of bringing books of registry into court, to prove their contents by exemplifications or certified copies.⁵ The originals, however, must be in some sense records.⁶

Exemplifications of recorded deeds admissible. § 192. Statutes authorizing the recording of deeds and other instruments usually provide that exemplifications of the instruments so recorded shall be admissible in evidence as *prima facie* proof of their contents. To make such copies evidence, however, the requisites of the statute prescribed for the recording and for exemplifications must be complied with.⁷

Subscribing witness need not be called. § 193. Of deeds duly acknowledged and certified, copies may be read in evidence, irrespective of the mode of attestation, in all cases where the statute does not prescribe a particular mode of attestation. In such case there is no necessity of calling the subscribing witnesses.⁸

Exemplifications of deeds in other States must be § 194. Exemplifications from registries of other States must be authenticated (unless there be local legislation or adjudications prescribing less stringent tests) according to the act of Congress.⁹ When the act of Con-

¹ Chamberlin v. Ball, 15 Gray, 352.

² Beverley v. Craven, 2 M. & Rob. 140.

³ Whart. on Ev. § 111.

⁴ See Whart. on Ev. § 113. *Infra*, § 547.

⁵ Whart. on Ev. §§ 108, 114, 127.

⁶ Schaben v. U. S. 6 Ct. of Cl. 230.

See Steere v. Tenney, 50 N. H. 461; Pennywit v. Kellogg, 1 Cincin. 17.

⁷ See Whart. on Ev. § 115.

⁸ *Ibid.*

⁹ Whart. on Ev. § 118.

gress is substantially complied with, they may be received.¹

proved under act of Congress.

§ 195. By statutes existing in many jurisdictions, it is provided that the certificates of public officers shall, under certain conditions, be admissible to prove facts within the range of the officer's official duty. At common law, however, the certificate of a public officer, no matter how high and solemn his office, is inadmissible to prove any disputed fact. The officer, if living, must be produced to swear to the fact. If he be dead, his official entries, made in the discharge of his duties, may be evidence. If the object is to prove that a fact appears by record, the record itself must be exemplified or produced. His certificate, however, being of the nature of hearsay, and *ex parte*, is in itself inadmissible.² If the certificate states simply a conclusion or an inference from a record, then the record itself, or an exemplified copy, is the proper proof.³ From the necessity of the case, however, an officer may be admitted to prove that a certain entry is not to be found in a registry or record.⁴

Certificates of officers admissible when provided by statute.

§ 196. A certificate of a public officer cannot cover facts out of the range of the officer's official cognizance; nor facts which are but a summary of writings on file in the archives of such officer; nor facts collateral to the record. The certificate cannot be by an informal letter or memorandum; it must be formally verified, under the officer's seal, and it must be made by the officer himself or his legal deputy.⁵

Certificate cannot bind as to facts out of record.

§ 197. In England the execution of a foreign or colonial deed cannot be proved by a notary's certificate.⁶ It is otherwise, however, by the law merchant, in respect to foreign negotiable paper; as to which the original protests or duly certified copies, when proved by the notarial seal, are *prima facie* evidence of demand and protest.⁷ Such certificates,

Notary's certificate admissible.

¹ Whart. on Ev. § 118.

² Whart. on Ev. § 120.

³ Ibid.

⁴ McGrath v. Seagrave, 2 Allen, 448; Com. v. Evans, 101 Mass. 25; cited supra, § 166. Infra, § 616.

⁵ Whart. on Ev. § 122.

⁶ Nye v. Macdonald, L. R. 8 P. C. 331; Earl's Trusts, L. R. 8 Eq. 98; Whart. on Ev. §§ 120-3.

⁷ 2 Daniel on Negot. Inst. § 959; Whart. on Ev. § 123.

however, must be in conformity with the law of the place of execution, on the principle, *locus regit actum*.¹

§ 198. Public documents, like statutes, may be proved by the printed volumes in which they are published by authority. In some cases this is provided by statute; in others, publications of this class fall within the range of matters of which courts take judicial notice.²

Printed
copies of
public doc-
uments re-
ceivable.

IV. SECONDARY EVIDENCE MAY BE RECEIVED WHEN PRIMARY IS UNPRODUCIBLE.

§ 199. Parol evidence is admissible to prove the contents of documents (including deeds, records, letters, notes, accounts, wills, and private memoranda) which have been lost or destroyed without any suspicion of spoliation attaching to the party offering to prove them by such evidence. As a prerequisite, however, to such admissibility, it must appear that due, but fruitless, efforts have been made to produce them in court;³ though, if the document were executed in duplicate or triplicate, &c., the loss of all the parts must be proved, in order to let in secondary evidence of its contents.⁴ Where an indictment for forgery, libel, or larceny avers the character or contents of a lost document, secondary evidence of the document may be produced before the grand jury, and its purport or substance, as near as may be, may afterwards be proved on trial before the petit jury.⁵ A volume of reports has been held admissible for the purpose, when the papers in the case were lost, of proving secondarily certain facts stated in

Lost or
destroyed
document
may be
proved by
parol.

¹ Whart. on Ev. § 123.

² Whart. on Ev. §§ 108, 127, 317.

³ Supra, § 118; R. v. Vernon, 12 Cox C. C. 153; R. v. Colucci, 3 F. & F. 103; R. v. Johnson, 7 East, 66; R. v. Haworth, 4 C. & P. 254; Brewster v. Sewell, 3 B. & A. 303; U. S. v. Reyburn, 6 Pet. 352; U. S. v. Britton, 2 Mason, 468; Hedrick v. Hughes, 15 Wall. 123; Augur v. Whittier, 118 Mass. 532; Chamberlin v. Man. Co. 118 Mass. 532; People v. Badgeley, 16 Wend. 53; People v. Kingsley, 2

Cow. 522; Pendleton v. Com. 4 Leigh, 694; Allen v. Parish, 3 Ohio, 107; Thompson v. State, 30 Ala. 28, and other cases cited Whart. on Ev. § 129.

So as to papers mutilated by defendant. State v. Shinborn, 46 N. H. 497; Thompson v. State, 30 Ala. 28.

⁴ R. v. Castleton, 6 T. R. 236; B. N. P. 254; Alivon v. Furnival, 1 C., M. & R. 292.

⁵ Whart. Cr. Pl. & Pr. § 176. Infra, § 216.

the papers.¹ Where, however, the party could legitimately procure the document, a copy cannot be received.²

§ 200. It is also admissible to prove by secondary evidence a document which it is out of the power of the party to produce.³ This right has been held to apply to papers in the hands of an attorney who could not be compelled to deliver them up,⁴ though it is otherwise if the delivery could be compelled ;⁵ to papers fraudulently concealed by the opposite party ;⁶ and to papers out of the jurisdiction of the court,⁷ provided due efforts be made to obtain the evidence of the person holding the papers.⁸ Thus, parol evidence of an insurance policy is admissible when it has been surrendered by the defendant before the trial to the insurance agent who was out of the jurisdiction of the court.⁹

So of papers out of power of party to produce.

§ 201. We will hereafter see¹⁰ that a party who wilfully destroys or mutilates papers subjects himself to a presumption of spoliation which tells seriously against him on trial. It does not, however, follow because the paper is accidentally destroyed by the party himself, or otherwise negligently injured, that secondary proof of its contents is inadmissible. In such case, there being no fraud attached to the party offering the parol evidence, it may be received.¹¹

Accidental destruction of a document by a party does not preclude from this resort.

§ 202. Different grades of authority, as we have already seen, are assignable to copies, in proportion to their apparent accuracy. Undoubtedly an examined copy is far more authoritative than a *memoriter* report.¹² Thus a letter book of a party, sworn to by himself or his clerk, will be received as proof of the contents of a lost letter ;¹³ nor will a party who has or may obtain such a copy, but withholds it, be permitted to

Copies of copies not receivable.

¹ Taylor v. Com. 29 Grat. 780.

² Whart. on Ev. § 129.

³ Dyer v. Smith, 12 Conn. 384; Denton v. Hill, 4 Hayw. 73; Cooper v. Day, 1 Rich. Eq. 26.

⁴ Lynde v. Judd, 3 Day, 499.

⁵ Bird v. Bird, 40 Me. 392.

⁶ Marlow v. Marlow, 77 Ill. 633.

⁷ Burton v. Driggs, 20 Wall. 133; and other cases cited Whart. on Ev. § 130.

⁸ McGregor v. Montgomery, 4 Barr, 237; Dickinson v. Breeden, 25 Ill. 186; Wood v. Cullen, 13 Minn. 394.

⁹ State v. Watson, 63 Me. 128.

¹⁰ Infra, §§ 741-8.

¹¹ Whart. on Ev. § 132; supra, § 174; People v. Dennis, 4 Mich. 609; State v. Taunt, 16 Minn. 109.

¹² Whart. on Ev. § 133.

¹³ Supra, § 177.

prove portions of such letter, or give orally its imperfect substance.¹ But even a letter-press copy cannot, it is held, be treated as an original.² And a copy must be proved by a witness who has compared it with the lost original.³ A copy of a copy, it need scarcely be added, is inadmissible.⁴

Abstracts
and sum-
maries
receivable.

§ 203. A witness called upon to speak as to the contents of a lost document may refresh his memory by abstracts whose correctness he can verify.⁵

So as to
records.

§ 204. Records when lost or destroyed may in like manner be proved either by copy, or by the recollection of witnesses.⁶ In such case, if there be a certified copy extant, that should be produced.⁷ And where a record has become illegible from wear and lapse of time, a witness who has examined and copied it when legible may be called to supply the defect.⁸ But parol evidence will not be received of a record of which only part is lost. That which still exists must be produced or exemplified.⁹ Nor is a party permitted to prove orally a record of which he could obtain an office copy unless the record be shown to be lost so that the office copy is unattainable.¹⁰ Where the non-production of the original is owing to the misconduct of the opposing party a copy is admissible.¹¹

Witness
must have
been ac-
quainted
with orig-
inal.

§ 205. A witness, to be entitled to give *memoriter* proof of a lost document, must have read it, or heard its contents from its author, and be able to speak at least to the substance of such contents.¹² As we have seen, in testifying he may refresh his memory by abstracts taken by

¹ Dennis v. Barber, 6 S. & R. 420; Merritt v. Wright, 19 La. An. 91. See, however, as to degrees of secondary evidence, supra, § 174.

² Chapin v. Siger, 4 McLean, 378; Merritt v. Wright, 19 La. An. 91. See supra, § 174.

³ McGinniss v. Sawyer, 63 Penn. St. 259. See supra, § 178.

⁴ Whart. on Ev. § 133.

⁵ Burton v. Driggs, 20 Wall. 133; Sizer v. Burt, 4 Denio, 426; Ins. Co. v. Weide, 9 Wall. 677; Mayson v. Beazley, 27 Miss. 106.

⁶ Whart. on Ev. § 135; State v.

Hare, 70 N. C. 658; Allen v. State, 21 Ga. 217; Davis v. State, 58 Ga. 170.

⁷ Whart. on Ev. § 136.

⁸ Little v. Downing, 37 N. H. 355. See Coffeen v. Hammond, 3 Green (Iowa), 241.

⁹ Nims v. Johnson, 7 Cal. 110.

¹⁰ Whart. on Ev. § 136. See supra, § 174.

¹¹ Whart. on Ev. §§ 137, 1264-70. Infra, § 741.

¹² See infra, § 461; Whart. on Ev. § 205

himself.¹ The admissions of the party himself are sufficient to sustain the accuracy of a copy.² But to prove the contents of a lost writing it is not necessary to call the writer; any witness familiar with the contents is equally admissible.³

§ 206. Whether secondary evidence of a lost document is admissible is a question exclusively for the court; and to sustain such admission, the prior existence and genuineness of the document must be established, and it must also be satisfactorily shown that the document cannot be produced by the party seeking to prove secondarily its contents.⁴

Court must be satisfied that original writing is not producible, and would be evidence if produced.

§ 207. Loss can only be established inferentially. In one sense no existing instrument can be spoken of as lost, or irrevocably out of the power of the party desiring to produce it. A check or promissory note may be carefully put away in a book, and the place of deposit forgotten. Every effort may be honestly made to find it; it is all the time in the seeker's library, in the very place where he put it; yet after all it may be hopelessly lost. It is not necessary, therefore, to prove exhaustively that the paper exists nowhere. It is sufficient if the party offering parol proof show such diligence as is usual with good business men under the circumstances.⁵

Loss to be inferentially proved.

As an accomplice is presumed to destroy letters implicating him in guilt, it is not necessary, it has been said, to prove diligent search for such letters, traced to his possession, in order, on general proof of their loss, to give parol evidence of their contents.⁶

§ 208. Proof of the loss of a non-produced document may be dispensed with by the admissions of the opposing party.⁷

Or by admission of opponent.

§ 209. The custodian of a document, if it is alleged to be lost,

¹ Supra, § 203; *Burton v. Driggs*, 20 Wall. 133; *Inst. Co. v. Weide*, 9 Wall. 677; *Sizer v. Burt*, 4 Denio, 426; *Whart. on Ev.* § 516.

² *Whart. on Ev.* § 1091. Supra, § 165.

³ *Whart. on Ev.* § 1091. Supra, § 165.

⁴ *R. v. Hurley*, 2 M. & Rob. 473; *R. v. Benson*, 2 Camp. 508; *Bank*

Prosecutions, R. & R. 378. See supra, § 174.

⁵ *Whart. on Ev.* § 141.

⁶ *Whart. on Ev.* § 142.

⁷ *U. S. v. Doeblor*, 1 Bald. 519.

⁸ *R. v. Haworth*, 4 C. & P. 254; *Shortz v. Unangst*, 3 W. & S. 45; *Cooper v. Maddan*, 6 Ala. 431. See *Whart. on Ev.* § 1091.

Custodians to be inquired of. must, unless he be one of the defendants in the case and set up privilege, be required to make due search, and the fruitlessness of such search must be shown before secondary evidence can be let in. Where such person is dead, inquiry must be made of his legal representatives, if the matter concerns his personalty, or of his heirs, if it concerns his realty.¹

§ 210. It is not enough for a party offering secondary evidence simply to swear that he has made general search for the missing paper.² Search in probable places of deposit must be proved, and the parties last in possession of the paper must, if possible, be examined; and the search must be by persons having access to probable places of deposit, and must be recent.³

Third person, in whose hands is document, must be subpoenaed to produce. § 211. When a document is traced into the hands of a third party, he should be summoned by a *subpoena duces tecum* to bring it into court. If living, and within reach of process, his declarations as to the fate of the paper are inadmissible.⁴

V. SO WHEN DOCUMENT IS IN HANDS OF OPPOSITE PARTY.

§ 212. When it is desired to give secondary evidence of a document in the possession of an opposing party, it is necessary, by the common law practice, to give such party notice to produce the paper a suitable period before the trial.⁵ The rule is not restricted to paper documents. Thus where it was proved that a ring which had been lost had an inscription upon it, and that the prisoner had been seen with a ring like the one which had been lost and with an inscription upon it, the counsel for the prosecution was not permitted to ask what was the inscription upon the ring seen in the

¹ Whart. on Ev. § 144.

254; R. v. Hunter, 4 C. & P. 128;

² R. v. Vernon, 12 Cox C. C. 153; and other cases cited Whart. on Ev. § 147.

Williams v. State, 16 Ind. 401; State v. Kimbrough, 2 Dev. 431; State v. Davis, 69 N. C. 313; Henderson v. State, 14 Tex. 503. For other cases

³ Whart. on Ev. § 147.

⁴ Whart. on Ev. § 150.

see Whart. on Ev. § 152. For the practice as to inspection of papers see Whart. on Ev. § 745. *Infra*, § 564.

⁵ Atty. Gen. v. La Merchant, 2 T. R. 201; R. v. Haworth, 4 C. & P.

prisoner's possession, no notice to produce the ring having been given to the prisoner.¹

§ 213. After refusal of the party having the instrument to produce it, the party calling for it may produce secondary evidence of its contents. If the secondary evidence so offered is vague and indistinct, this, it must be remembered, is to be imputed, not to negligence on the part of the party offering it, but to the refusal of the party holding the superior evidence to produce such evidence.²

After refusal secondary evidence can be introduced.

§ 214. Of documents which are in court, a notice given at the trial is generally sufficient ;³ but as to a document not in court, the notice must be given a sufficient period before the trial to enable the party called upon conveniently to produce it.⁴ The question of the length of notice is dependent upon that of the object for which the notice is given.⁵ But where the time is insufficient to enable the documents to be brought in, and where there is no bad faith or negligence in the party in putting them at a distance,⁶ then the notice is not sufficient to admit secondary evidence.⁷ In criminal issues, the practice in England is to give notice to produce a reasonable time before the commencement of the assizes.⁸

Notice must be timely.

§ 215. A mere notice to produce does not make the document called for admissible as evidence, though where A. calls upon B. to produce a document, and B. produces it, Notice to produce does not

¹ *R. v. Farr*, 4 F. & F. 336.

² *R. v. Watson*, 2 T. R. 201; *Com. v. Goldstein*, 114 Mass. 272; *State v. Davis*, 69 N. C. 313. For other cases see *Whart. on Ev.* § 153.

³ *Whart. on Ev.* § 155.

⁴ *R. v. Ellicombe*, 1 M. & Rob. 260; *R. v. Hankins*, 2 C. & K. 823; *R. v. Kitson*, P. & D. 187; 6 Cox C. C. 159; *R. v. Hamp*, 6 Cox C. C. 167; *Shreve v. Dulany*, 1 Cranch C. C. 499; *People v. Badgely*, 16 Wend. 53; *Williams v. State*, 16 Ind. 401; *Henderson v. State*, 14 Tex. 503.

In *R. v. Barker*, 1 F. & F. 326, a notice to produce policies of insur-

ance served on the prisoner's attorney on Tuesday evening, the policies being then twenty miles off, and the trial taking place on the Thursday, was held sufficient, it being shown that there was an opportunity of procuring the policies, if the prisoner had chosen to do so.

⁵ See *Whart. on Ev.* § 155.

⁶ As to this, see *Bryan v. Wagstaff*, Ry. & M. 327; S. C., 2 C. & P. 123; *Sturge v. Buchanan*, 10 A. & E. 598.

⁷ *Whart. on Ev.* § 155.

⁸ *R. v. Hunter*, 4 C. & P. 128; *R. v. Haworth*, 4 C. & P. 254; *R. v. Robinson*, 5 Cox C. C. 183.

make a document evidence. this *prima facie* avoids the necessity of proving such document on A.'s part, where it is relied on by B. as part of his title. But A. is not obliged to put in evidence the papers called for by him; though when A., after notifying B. to produce a paper on trial, takes such paper and inspects it, so as to become acquainted with its contents, then A. is bound to treat the paper, if relevant, as his evidence.¹

§ 216. In criminal issues, the fact that the indictment charges the defendant with stealing, or in other way misappropriating a particular document, is a sufficient notice to the defendant to produce the document; and under such circumstances, parol evidence of the document is admissible without notice to produce.² Nor is it necessary that the indictment should aver the loss or destruction of the document.³ The same rule has been applied under an indictment for administering an unlawful oath, to enable the prosecution to prove by parol the paper from which the oath was read without notice to produce the paper.⁴ But an indictment for arson, with intent to defraud an insurance office, does not convey such a notice that the policy will be required as to dispense with a formal notice to produce.⁵ And the rule has been held not to extend to an indictment for forging a deed.⁶

¹ Whart. on Ev. § 156.

² R. v. Aickles, 1 Leach, 294; R. v. Hunter, 4 C. & P. 128; R. v. Downham, 1 F. & F. 386; R. v. Elworthy, L. R. 1 C. C. 103; State v. Mayberry, 48 Me. 218; People v. Holbrook, 13 Johns. 90; People v. Kingsley, 2 Cow. 522; People v. Badgely, 16 Wend. 53; State v. Potts, 4 Halst. 26; Com. v. Messenger, 1 Binn. 274; Pendleton v. Com. 4 Leigh, 694; McGinnis v. State, 24 Ind. 500; State v. Davis, 69 N. C. 313; Gray v. Kernahan, 2 Mill (S. C.), 65; Morgan v. Jones, 24 Ga. 155. See supra, § 119.

³ State v. Potts, 4 Halst. 26.

⁴ R. v. Moors, cited 6 East, 421.

⁵ R. v. Ellicombe, 5 C. & P. 522, per Littledale, J.; 1 M. & Rob. 260; R. v. Kitson, 22 L. J. M. C. 118; 6 Cox C. C. 159; P. & D. 187. See R.

v. Humphries, cited 2 Russ. on Cr. 745; R. v. Mortlock, 7 Q. B. 459.

⁶ R. v. Haworth, 4 C. & P. 254.

“Upon an indictment for perjury, it was held that secondary evidence of a draft last seen in the possession of the prisoner was inadmissible, no notice to produce having been given, and the indictment not operating as a notice. It must be observed, however, that the course which the evidence took at the trial was such, that a great deal turned on the contents of the draft, and on alterations alleged to have been made in it, and it would appear that this circumstance was regarded by several of the judges as of great importance.” R. v. Elworthy, L. R. 1 C. C. R. 103; 37 L. J. M. C. 3, as cited in Roscoe's Ev. 8th ed. 10.

§ 217. Where a party is served with a notice to produce, it is not necessary, in order to prove such notice, that the party served should be called on to produce it in court.¹

No notice
needed as
to notice to
produce.

§ 218. Facts collateral to documents can be proved without notice; and this includes the fact that a letter was sent, and facts relating to the existence and execution of a document when not involving its contents.²

Collateral
facts as to
document
may be
proved
without
notice.

¹ Whart. on Ev. § 162.

² Whart. on Ev. § 163.

CHAPTER V.

PRIMARINESS AS TO ORAL TESTIMONY.

I. HEARSAY GENERALLY INADMISSIBLE.

Hearsay in its largest sense convertible with non-original, § 220.

Non-original evidence generally inadmissible, § 221.

Objections to such evidence, § 222.

Acts may be hearsay, § 223.

Interpretation is not hearsay, § 224.

Testimony of non-witnesses not ordinarily receivable when reported by another, § 225.

So of acts concerning strangers, § 226.

II. EXCEPTION AS TO WITNESS ON FORMER TRIAL.

Evidence of deceased witness in former trial admissible, § 227.

Death of witness may be presumed from lapse of time, § 228.

So of witnesses out of jurisdiction or subsequently incompetent, § 229.

So of insane or sick witness, § 230.

Mode of proving evidence in such case, § 231.

III. EXCEPTION AS TO MATTERS OF GENERAL INTEREST.

Reputation of community admissible as to matters of public interest, § 232.

IV. EXCEPTION AS TO PEDIGREE, RELATIONSHIP, BIRTH, MARRIAGE, AND DEATH.

Hearsay may prove pedigree, § 233.

Marriage may be so proved, § 234.

Relationship of declarants necessary to admissibility, § 235.

Such declarations may extend to facts of birth and death, § 236.

Writings of deceased ancestor admissible for same purpose, § 237.

And so may conduct, § 238.

Declarations may go to facts from which relationship may be inferred, § 239.

Must have been *ante litem motam*, § 240.

Declarant must be dead, § 241.

Ancient family records and monuments admissible for same purpose, § 242.

So of inscriptions on tombstones and rings, § 243.

So of pedigrees and armorial bearings, § 244.

Death may be proved by reputation, § 245.

So may marriage, § 246.

Peculiarity in suits for adultery, § 247.

V. EXCEPTION AS TO SELF-DISSERVING DECLARATIONS OF DECEASED PERSONS.

Such declarations receivable, § 248.

No objection that such declarations are based on hearsay, § 249.

Declarations must be self-disserving, § 250.

VI. EXCEPTION AS TO BUSINESS ENTRIES OF DECEASED PERSONS.

Entries of deceased or non-procurable persons in the course of their business admissible, § 251.

So of notes of counsel and other officers, § 252.

So of notaries' entries, § 253.

VII. EXCEPTION AS TO GENERAL REPUTATION WHEN SUCH IS MATERIAL.

Admissible to bring home knowledge to a party, § 254.

But inadmissible to prove facts, § 255.

Hearsay is admissible when hearsay is at issue, § 256.

So to prove condition of party's mind, § 257.

Value so provable, § 258.

And so as to character, § 259.

But not conclusions of law; *e. g.* nuisance, gaming-house, barratry, § 260.

Otherwise when notoriety is at issue, § 261.

VIII. EXCEPTION AS TO REFRESHING MEMORY OF WITNESS.

For this purpose hearsay admissible, § 261 *a.*

IX. EXCEPTION AS TO RES GESTÆ.

Res gestæ admissible though hearsay, § 262.

Must spring immediately from act, § 263.

Retrospective narratives not part of *res gestæ*, § 264.

Coincident business declarations admissible, § 265.

What is done or exhibited at occurrence may be proved, § 266.

Test of secondariness does not apply, § 267.

Statements in preparation of crime inadmissible, § 268.

Declarations inadmissible to explain inadmissible acts; nor are declarations admissible without acts, § 269.

Inadmissible if the witness himself could be obtained, § 270.

X. EXCEPTION AS TO DECLARATIONS CONCERNING PARTY'S OWN HEALTH AND STATE OF MIND.

Declarations of a party as to his own injuries admissible, § 271.

So as to his condition of mind when such is at issue, § 272.

So as to prosecutrix in rape, § 273.

So as to person whose assent to an act has to be proved, § 274.

XI. DYING DECLARATIONS.

General grounds of admissibility, § 276.

Evidence does not conflict with constitutional limitation, § 277.

But cannot be received to prove facts distinct from homicide, § 278.

Such facts may be received to sus-

tain declarant's mental capacity, § 279.

Declarations of dying persons not admissible as to another's death who was simultaneously killed, § 280.

Declaration must be under a solemn sense of impending dissolution, § 281.

Yet this may be inferentially shown, § 282.

No objection that medical attendant had hope, § 283.

Expressions indicating belief in impending death, § 284.

Even a faint hope excludes, § 285.

Need not have been immediately before death, § 286.

Prior declarations may be affirmed immediately before death, § 287.

Only admissible when death is the subject of the charge, § 288.

Admissible from husband against wife, and *vice versa*, § 289.

Deceased must have been competent as a witness, § 290.

Infants, § 290.

Infidels, § 291.

Infamous persons, § 292.

May be proved by signs, § 293.

Evidence must have been admissible had deceased been sworn.

Matters of opinion, § 294.

Declarations reduced to writing, § 295.

Admissible without above limitations when part of the *res gestæ*, § 296.

Admissibility is for the court, § 297.

Are to be examined and impeached by same tests as are applicable to evidence adduced on trial, § 298.

Inadmissible if clearly fragmentary, § 299.

No objection that questions were leading if deceased spoke intelligently, § 300.

Substance may be proved, § 301.

Character of deceased for truth may be impeached, § 302.

Jury to judge of credibility, § 303.

Admissible when in defendant's favor, § 304.

I. HEARSAY GENERALLY INADMISSIBLE.

§ 220. ACCORDING to Mr. Bentham,¹ hearsay evidence is divisible as follows : —

In its largest sense convertible with non-original. 1. Supposed oral through oral ; which he defines to be “supposed orally delivered evidence of a supposed extra-judicially narrating witness, judicially delivered *viva voce* by the judicially deposing witness ;” which he declares to be the only species of unoriginal evidence to which the term “hearsay” is strictly applicable.

2. Supposed oral through “scriptitious,” or written.

3. Supposed scriptitious through oral.

4. Supposed scriptitious through scriptitious.

To which may be added, —

5. Supposed material through oral or scriptitious.

The third and fourth of these modifications have been already partially considered under the general head of secondary evidence. The fifth, as of comparatively unfrequent occurrence, may be noticed at the outset.²

§ 221. Suppose, for instance, after a *post mortem* examination, in a case where poisoning is charged, portions of the remains are given by E., the examining physician (an extra-judicial witness, as Mr. Bentham would call him), to J. ; and J. produces these remains on trial, where, under the direction of the court, they are subjected to a chemical analysis. This is hearsay, because E. is not examined on trial to prove the identity of the remains with those which J. produces. Or, after a murder, the deceased’s clothes are taken off by E. and handed to J., who brings them into court, and testifies that they are the clothes given to him by E. as having been taken from the body of the deceased. The articles thus produced are hearsay, in the wide sense of the term, and should be rejected. The question of terms is comparatively unimportant. With Mr. Bentham we may call such evidence simply “unoriginal ;” with Mr. Best, “second-hand ;” or we may fall back, as is here done, upon the

¹ *Rationale of Jud. Ev.* Lond. 1827, iii. 439, Jas. Mill’s ed.

qualification that no primary evidence is rejected because of its faintness.

² It is important, as to these several classes, to keep in mind the general

Supra, § 160.

general title of hearsay, as designating all testimony from a non-original source. It is in this sense that the term "hearsay" is to be used in the following sections.

§ 222. The objections to hearsay testimony are as follows: — Objections
to such
evidence.

1. *The depreciation of truth arising from its passing through one or more fallible media.*

2. *The abuses likely to arise from a non-discrimination by juries between primary and secondary.*

3. *Its irresponsibility.*¹

§ 223. Acts as well as words may be hearsay, just as acts as well as words may be primary evidence.² An impostor dresses himself as an officer of the army, and obtains credit on the basis of his being such an officer. If so, his dress and style are as much a declaration on his part as would be the words, "I am an officer of the army." In such case these acts, when put in evidence against him, bind him as much as would verbal statements to the same effect.³ On the other hand, when we can get primary and immediate evidence of a particular condition, it is as much hearsay to put in evidence what third persons *did* in consequence of such a condition, as what third persons *said*.⁴ Acts may
be hearsay.

§ 224. The evidence of a sworn interpreter, as given in court, is not hearsay, the transmission being immediate, and the witness interpreted being sworn in court.⁵ An illustration of the same principle may be found in the fact that a witness may interpret for himself, without the intervention of an interpreter.⁶ We should remember, also, following the distinction already noticed, that when an interpreter acts, out of court, as an agent for a party, his statements are to be regarded as the statements of the party whom he represents.⁷ So Interpreta-
tion not
hearsay.

¹ See these points developed in Whart. on Ev. §§ 172 *et seq.*

² See *Porter v. State*, 1 Tex. Ap. 394.

³ See *R. v. Giles*, L. & C. 502; *R. v. Story*, R. & R. 81; *R. v. Barnard*, 7 C. & P. 784; *R. v. Hunter*, 10 Cox C. C. 642; and see *Wright v. Tatham*, 7 A. & E. 318. *Infra*, § 683.

⁴ Whart. on Ev. § 173.

⁵ See *Swift v. Applebone*, 23 Mich. 252; *People v. Ah Wee*, 48 Cal. 236; *Scheerer v. Harber*, 36 Ind. 536. *Infra*, § 375.

⁶ *Com. v. Kepper*, 114 Mass. 278.

⁷ Whart. on Ev. § 174.

we may receive in evidence the rendering in the vernacular by a witness of a confession heard by him in a foreign tongue.¹

§ 225. Extra-judicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gestae*, or made by deceased persons in the course of business, or as admissions against their own interest, or are material for the purpose of determining the state of the mind of a party who cannot be examined in court.² In this sense as hearsay are to be considered opinions of others as to the wealth and *status* of an individual;³ letters from third parties, though non-residents;⁴ information derived from others as to contemporaneous historical events;⁵ recitals in deeds as against strangers;⁶ declarations of relatives (living at the trial) as to the mental condition of a person whose sanity is disputed;⁷ and opinions of a neighborhood as to such sanity.⁸ Hence, on an indictment for murder, the admissions of other persons that they killed the deceased, or committed the crime in controversy, are not evidence;⁹ and evidence of threats by other persons are inadmissible;¹⁰ and so of declarations of the deceased

¹ *People v. Ah Wee*, 48 Cal. 236.

² See Whart. on Ev. § 175; and see *Mima Queen v. Hepburn*, 7 Cranch, 290; *Nudd v. Burrows*, 91 U. S. 426; *Gaines v. Relf*, 12 How. 472; *Weston v. Iron Co.* 13 Allen, 95; *Brown v. Mooers*, 6 Gray, 451; *Young v. Makepeace*, 103 Mass. 50; *Luby v. R. R.* 17 N. Y. 131; *Thomas v. People*, 67 N. Y. 218; *Wiggins v. People*, 4 Hun, 540; *Lancaster Co. Bk. v. Moore*, 78 Penn. St. 407; *Rosenstock v. Tormey*, 32 Md. 169; *Cheek v. State*, 35 Ind. 492; *Mershorn v. State*, 54 Ind. 14; *Bergen v. People*, 17 Ill. 426; *State v. Stubbs*, 49 Iowa, 203; *State v. Vincent*, 24 Iowa, 570; *State v. Reidel*, 26 Iowa, 430; *State v. Haynes*, 71 N. C. 79; *State v. Davis*, 77 N. C. 483; *State v. Boon*, 80 N. C. 461; *Hartshorn v. Williams*, 31 Ala. 149; *Hall v. State*, 51 Ala. 9; *Davis v. State*, 37 Tex. 277; *Harris v. State*, 1 Tex. Ap. 74; *Bornheimer v.*

Baldwin, 42 Cal. 27. See *North Stonington v. Stonington*, 31 Conn. 412.

³ *Caswell v. Howard*, 16 Pick. 567.

⁴ *U. S. v. Barker*, 4 Wash. C. C. 464; and other cases cited Whart. on Ev. § 175.

⁵ *Swinerton v. Ins. Co.* 9 Bosw. 361; *Milbank v. Dennistoun*, 10 Bosw. 382.

⁶ *Spaulding v. Knight*, 116 Mass. 148; *Rose v. Taunton*, 119 Mass. 99; *Hardenburgh v. Lakin*, 47 N. Y. 111; *Yahoola Co. v. Irby*, 40 Ga. 479. See Whart. on Ev. §§ 1034, 1042.

⁷ *Heald v. Thing*, 45 Me. 392.

⁸ *Lancaster Co. Bk. v. Moore*, 78 Penn. St. 407; qualifying *Rogers v. Walker*, 6 Barr, 375.

⁹ *Thomas v. People*, 67 N. Y. 218; *Smith v. State*, 9 Ala. 990; *Snow v. State*, 54 Ala. 136; *S. C.*, 58 Ala. 372; *Sharp v. State*, 6 Tex. Ap. 650.

¹⁰ *Thomas v. People*, 67 N. Y. 218; *State v. Duncan*, 6 Ired. 236; *State v.*

before his death that he was about to disappear,¹ or that he expected violence.² On an indictment for larceny, also, declarations of third parties that they committed the theft are inadmissible.³ But if such third persons, on being examined as witnesses, had implicated the prisoner by their testimony, evidence of their declarations that they were guilty of the offence is admissible to discredit the witnesses;⁴ and it has been held admissible for a witness to state that he was induced by information derived from a negro to waylay a party suspected of a design to commit a felony.⁵ It is no reason for receiving hearsay statements of this class that the person making them is dead⁶ (unless under the limitations which will be hereafter designated), or that he was called as a witness, and, being suddenly taken sick, was unable to attend the trial;⁷ or that he is legally incompetent as a witness.⁸

§ 226. As hearsay are to be regarded, except under limitations to be hereafter noticed, adjudications between strangers, and public acts affecting strangers, or in which strangers are concerned.⁹

So of public acts as to strangers.

Haynes, 71 N. C. 79; *State v. Davis*, 77 N. C. 483; *State v. Johnson*, 80 La. An. 921; *Walker v. State*, 6 Tex. Ap. 576; *People v. Murphy*, 45 Cal. 137.

¹ *State v. Vincent*, 24 Iowa, 570; *Crookham v. State*, 5 W. Va. 510.

² Even the declarations of a husband, alleged to have been killed by his wife, made some time before his death, and not shown to have been communicated to her, cannot be admitted against her. *Weyrich v. People*, 89 Ill. 90. See, however, *infra*, § 264; *R. v. Edwards*, 12 Cox, C. C. 230, *infra*, § 281.

³ *Rhea v. State*, 10 Yerg. 258. See *Davis v. State*, 37 Tex. 277.

⁴ *Smith v. State*, 9 Ala. 980.

⁵ *Whaley v. State*, 11 Ga. 123, *sed quaere*.

In conformity with the general rule, where, on trial of an indictment for murder, a witness for the prosecution

testified that she had seen the two defendants come from a room where the dead body was found, under suspicious circumstances, it was held that the prosecution could not show by other witnesses, that she at once, while giving the alarm, gave the names of the two persons thus seen. *Com. v. James*, 99 Mass. 438. And with this accords the well known position that a witness cannot in general be corroborated by proof of prior statements made by him to others. *Infra*, § 492.

⁶ *Crump v. Starke*, 23 Ark. 131.

⁷ *Gaither v. Martin*, 3 Md. 146.

⁸ *Churchill v. Smith*, 16 Vt. 595; *Nettles v. Harrison*, 2 McCord, 230; *Smith v. State*, 41 Tex. 352 (a case of an infant too young to be sworn).

⁹ See, as to judgments, *infra*, § 595; and as to public acts, *Whart. on Ev.* § 176; and see *supra*, § 195.

II. EXCEPTION AS TO WITNESS ON FORMER TRIAL.

§ 227. To the rule excluding hearsay the first exception we have to notice is the following: What a deceased witness testified to on a former procedure against the same defendant, for the same offence as that under trial, or for an offence substantially the same, may be proved by witnesses who heard the testimony of the witness; nor is such oral evidence excluded by the fact that the original testimony was reduced to writing, nor, in criminal cases, by the constitutional provision that the defendant is entitled to be confronted with the witnesses against him.¹ The exception is thus given by Mansfield, C. J.: "What a witness, since dead, has sworn upon a trial between the same parties may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given."² In criminal prosecutions this rule has been frequently applied to evidence taken under the statutes 1 & 2 and 2 & 3 Phil. & M., which have been held to have the force of common law in several of the United States.³ What a deceased witness swore to at the preliminary hearing before the committing magistrate is evidence at the trial in chief;⁴ what a deceased witness swore to on a criminal trial is evidence on a second trial for the same offence, or an offence substantially the same.⁵ If the evidence was *coram*

¹ R. v. Bromwich, 1 Leach, 180; v. Johnson, 12 Nev. 121; Johnson v. Salk. 281; Roscoe's Crim. Ev. 67; State, 1 Tex. Ap. 333. The deposition of a party may be so used, and U. S. v. White, 5 Cranch C. C. 457; so may notes of his testimony. Rhine U. S. v. Macomb, 5 McLean, 287; v. Robinson, 27 Penn. St. 30; Whart. State v. Hooker, 17 Vt. 658; Com. v. on Ev. § 227; Jones v. Ward, 3 Jones Richards, 18 Pick. 434; Finn v. Com. (N. C.), 24.
⁵ Rand. (Va.) 701; Summons v. State, 5 Oh. St. 325; O'Brian v. Com.

² Mayor of Doncaster v. Day, 3 Taunt. 262; Powell's Evidence, 4th ed. 217.

³ See R. v. Smith, 2 Stark. 208.

⁴ R. v. Edmonds, 6 C. & P. 164; State v. Hooker, 17 Vt. 658; though see *contra*, State v. Campbell, 1 Rich. 124.

⁵ R. v. Joliffe, 4 T. R. 290; R. v.

non judice, or the witness was not sworn,¹ or cross-examination was precluded or restricted,² or the witness was incompetent,³ the ground for admissibility fails. It is not, however, necessary that there should be an actual cross-examination, provided there be liberty to cross-examine.⁴

§ 228. As the testimony taken in a former trial cannot be read if the witness is obtainable, the question arises, what proof is requisite to establish the fact that the witness cannot be obtained. This question is generally presented in the shape of alleged death; and on this topic it is enough to say that death is to be inferred from the circumstances of each particular case, irrespective of any general presumption of law.⁵

Death may be presumed from lapse of time.

§ 229. Proof of mere disappearance of the original witness is not by itself enough to admit such testimony if by due diligence the witness's attendance could have been secured,⁶ though in civil issues it is sufficient to show that the original witness is absent, and a non-resident in the State where the trial is held, being out of

So of witnesses out of jurisdiction or since become incompetent.

Smith, R. & R. 339; R. v. Lee, 4 F. & F. 63; R. v. Dilmore, 6 Cox, 52; R. v. Williams, 12 Cox, 101 (under statutes); U. S. v. Macomb, 5 McLean, 287; U. S. v. White, 5 Cranch, 457; U. S. v. Wood, 3 Wash. C. C. 440; Com. v. Richards, 18 Pick. 434; Brown v. Com. 73 Penn. St. 321; Summons v. State, 5 Oh. St. 325; Barnett v. People, 54 Ill. 325; State v. McO'Blenis, 24 Mo. 402; State v. Houser, 26 Mo. 431; O'Brian v. Com. 6 Bush, 563; Kendrick v. State, 10 Humph. 479; People v. Diaz, 6 Cal. 248; State v. Atkins, 1 Overt. 229; though see *contra*, Finn v. Com. 5 Rand. 701; U. S. v. Sterland, 3 Quart. L. J. 244; 6 Pitts. L. J. 50; Brogy v. Com. 10 Grat. 722.

¹ See R. v. Eriswell, 3 T. R. 721.

² Steinkeller v. Newton, 1 Scott N. R. 148; S. C., 9 C. & P. 313; R. v. Ledbetter, 3 C. & K. 108; Bebee v. People, 5 Hill (N. Y.), 32; Barron

v. People, 1 Comst. 386; Summons v. State, 5 Oh. St. 325; State v. Campbell, 1 Rich. 124.

³ Schell v. State, 2 Tex. Ap. 30.

⁴ Cazenove v. Vaughan, 1 M. & S. 4; McCombie v. Anton, 6 M. & Gr. 27.

⁵ See this discussed *infra*, § 809. See also Benson v. Olive, 2 Str. 920.

⁶ U. S. v. Macomb, 5 McLean, 287; State v. Staples, 47 N. H. 113; Powell v. Waters, 17 Johns. 176; Wilbur v. Selden, 6 Cow. 162; Crary v. Sprague, 12 Wend. 41; Berney v. Mitchell, 34 N. J. L. 337; Brogy v. Com. 10 Grat. 722; Summons v. State, 5 Oh. St. 325; Bergen v. People, 17 Ill. 426; Kendrick v. State, 10 Humph. 479; Dupree v. State, 33 Ala. 380; Hobson v. Harper, 2 Blackf. 309; Collins v. Com. 12 Bush, 271; Gerhauser v. Ins. Co. 7 Nev. 174.

the jurisdiction of the court.¹ In criminal cases the testimony of a former witness, corruptly or otherwise unlawfully kept from court by the party against whom he is called, it has been held, may be in like manner reproduced, the defendant in the former trial having had the opportunity of cross-examining the witness.² And the former testimony of a witness who has intermediately become incompetent may be proved on a second trial.³

§ 230. Whether the deposition of a sick or insane witness can be taken in a criminal case depends upon local statutes,⁴ but wherever a deposition has been duly taken in

¹ *Fry v. Wood*, 1 Atk. 445; *Carpenter v. Groff*, 5 S. & R. 162; *Cavanhovan v. Hart*, 21 Penn. St. 495; *Wright v. Cumsty*, 41 Penn. St. 102; *Wilder v. St. Paul*, 12 Minn. 192. But not in criminal issues. *Collins v. Com.* 12 Bush, 271; *Hall v. State*, 6 Baxt. 522. In Texas, such evidence is admitted if defendant was in any way chargeable with the non-attendance; *Sullivan v. State*, 6 Tex. Ap. 319; or if, after diligent inquiry, the whereabouts of the witness cannot be ascertained. *Ibid.*

² *Morley's case*, 6 How. St. Tr. 770; *R. v. Scaife*, 2 Den. C. C. 281; 17 Q. B. 238; *R. v. Guttridge*, 9 C. & P. 471; *Williams v. State*, 19 Ga. 402; *State v. Houser*, 26 Mo. 431; *U. S. v. Reynolds*, 1 Utah T. 319; *aff.* 98 U. S. 145. *Infra*, §§ 741 *et seq.*, 749.

“In the leading text books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Green. Ev. § 163; 1 Taylor Ev. § 446. Mr. Wharton (1 Whart. on Ev. § 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called, but in reality his statement is the same as the others; for in all it is implied that the witness must have

been wrongfully kept away.” Waite, C. J., *U. S. v. Reynolds*, 98 U. S. 145. I have accordingly added “unlawfully” to the text.

³ Whart. on Ev. § 178.

⁴ In England the practice is thus stated:—

“Where the physician stated that the witness could not speak or hear from paralysis, and that if brought to court he would not be able to give evidence, yet that he might be brought there without danger to life, though he, as his physician, would not permit the prisoner to roam abroad if he knew it, it was held by the Court of Criminal Appeal that the deposition was rightly received. *R. v. Cockburn*, Dears. & B. C. C. 203; S. C., 7 Cox, 265. In *R. v. Walker*, 1 F. & F. 535, where it was proposed to put in evidence the deposition of a woman who had been recently confined, Wills, J., is reported to have said, ‘Illness from a confinement is an ordinary state, and not such an illness as is contemplated by the statute. I have considered the question with my brother Crowder. If you find it necessary for your case to put in the deposition, I have made up my mind to reserve the question for the opinion of the judges. It is one of importance; I have considered it; and my brother Crowder and myself are agreed upon it.’ But it became unnecessary to reserve the point.

a preliminary procedure, it can be received in subsequent proceedings against the same defendant, the witness being unobtainable.¹

§ 231. The evidence of the original witness may be proved by the notes of counsel, or of the judge, or of a short-hand reporter, sworn to by the reproducing witness; nor is it necessary that the notes should purport to give more than the substance of the language of the original wit-

Mode of
proof of
evidence of
deceased
witness.

There may, however, be incidents in regard to the state of pregnancy which may bring the case within the statute. *R. v. Stephenson*, 1 L. & C. 165; 31 L. J. M. C. 147. In *R. v. Boucher*, where evidence was given by the witness's husband, without medical evidence, that she was pregnant, but he could not state how far advanced she was, and that she was then attending to her household duties as usual, and he stated that, a fortnight before, he had driven her some distance, and she had suffered somewhat in consequence, *Bramwell, B.*, admitted the deposition. 3 F. & F. 285. Where a witness came to the assizes, but returned home by the advice of a medical man, who deposed that it would have been dangerous for the witness to remain, *Parke, B.*, held that the witness was 'unable to travel' within the meaning of this section, and allowed his depositions to be read. *R. v. Wicker*, 18 Jur. 252. A superintendent of police having seen a policeman in bed two days before the trial stated that he appeared ill, and that when he tried to get out of bed he could not stand, but he was unable to state what was the matter with him, except that he believed it to be rheumatics, and no medical man was called to be examined as to his condition. Held, that the deposition could not be admitted. Per *Piggott, B.*, *R. v. Williams*, 4 F. & F. 515. See also *R. v. Welton*, 9 Cox, 281; *R. v. Bull*, 12 Cox C. C. 31.

"It is a question for the judge at the trial to determine whether the proof of a witness being so ill as not to be able to travel is sufficient; and the Court of Criminal Appeal will not interfere with the exercise of his discretion. *R. v. Stephenson*, 1 L. & C. 165; 34 L. J. M. C. 147.

"There is nothing in the words of the statute which renders it necessary that the inability of the witness to attend at the trial should be permanent; it may, therefore, be implied that it need not be so. Before the statute it seems to have been doubted whether a merely temporary illness (as with a woman about to be confined) was a sufficient ground for admitting the deposition. 2 Stark. Ev. 383, 3d ed.; *R. v. Savage*, 5 C. & P. 143. And there can be no doubt that a judge would now exercise his discretion and decide whether, in the interests of justice, it were better to read the deposition or to adjourn the trial in order to obtain the oral testimony of the witness. See *R. v. Tait*, 2 F. & F. 553, where *Crompton, J.*, postponed the trial to the next assizes." *Roscoe's Cr. Ev.* 8th ed. 69. See also *R. v. Hogg*, 6 C. & P. 176; *R. v. Wilshaw*, C. & M. 145. The declarations of an infant, too young to be examined under oath, are necessarily excluded. *Smith v. State*, 41 Tex. 352.

¹ Whart. on Ev. § 178.

ness.¹ In such case the notes are not evidence *per se*; their only value being as means of refreshing the memory of the witness.² The testimony of the reproducing witness is not excluded by the fact that he does not recollect the testimony independent of his notes.³ But the whole relevant part of the testimony as remembered must, if required, be given,⁴ and the mere notes of the judge, unsworn to, or unproved, cannot be received.⁵ If the judge be alive he must be called as a witness, the notes being then receivable to refresh his memory.⁶

¹ Whart. on Ev. § 514; *Tod v. Winchelsea*, 3 C. & P. 387; *Doncaster v. Day*, 3 Taunt. 262; *R. v. Christopher*, 1 Den. C. C. 536; 2 Car. & K. 994; *U. S. v. Macomb*, 5 McLean, 286; *U. S. v. White*, 5 Cranch C. C. 457; *Emery v. Fowler*, 39 Me. 326; *Lime Bank v. Hewett*, 52 Me. 531; *Young v. Dearborn*, 22 N. H. 372; *Williams v. Willard*, 23 Vt. 369; *Huff v. Bennett*, 6 N. Y. 337; *Wolf v. Wyeth*, 11 S. & R. 149; *Rhine v. Robinson*, 27 Penn. St. 30; *Brown v. Com.* 73 Penn. St. 321; *Summons v. State*, 5 Oh. St. 325; *Burson v. Huntington*, 21 Mich. 415; *Fisher v. Kyle*, 27 Mich. 454; *Jones v. Ward*, 3 Jones, 24; *Trammell v. Hemphill*, 27 Ga. 525; *Gildersleeve v. Caraway*, 10 Ala. 260; *People v. Murphy*, 45 Cal. 137. For a more stringent rule see *U. S. v. Wood*, 3 Wash. C. C. 440; *Com. v. Richards*, 18 Pick. 434; *Warren v. Nichols*, 6 Cow. 162; *Black v. Woodrow*, 39 Md. 194. See *Black v. State*, 1 Tex. Ap. 368.

The question whether all had been sworn to which a deceased witness testified to at a former trial in a criminal case is properly within the province of the jury, and is preliminary to the consideration of such evidence. When it is evident that certain matters have been omitted in giving the evidence of a deceased witness, by a person who professes to give the substance of all the statements of such

deceased witness, the evidence of such person will not be rejected, if the jury are satisfied that, in connection with the testimony of others, they have the substance of all the evidence given by such witness at the former trial. It is not necessary, therefore, that the testimony should all be proved by a single witness. *Summons v. State*, 5 Oh. St. 325.

² *Waters v. Waters*, 35 Md. 531; *Zitske v. Goldberg*, 38 Wis. 217. See fully Whart. on Ev. § 514.

³ *Rhine v. Robinson*, 27 Penn. St. 30; *Brown v. Com.* 73 Penn. St. 321; *Jones v. Ward*, 3 Jones N. C. 24; though see *Lightner v. Wike*, 4 S. & R. 203.

⁴ Whart. on Ev. § 180.

“The rule is settled, that when proof is offered of what a deceased witness has testified at a former hearing, it must be not merely of a part of it, or the substance of it, but the whole of the testimony touching the matter in controversy. *Com. v. Richards*, 18 Pick. 434; *Warren v. Nichols*, 6 Met. 261.” *Chapman, J., Woods v. Keyes*, 14 Allen, 238.

⁵ *Miles v. O'Hara*, 4 Binn. 108; *Livingston v. Cox*, 8 W. & S. 61; *State v. McLeod*, 1 Hawks, 344. See Whart. on Ev. § 180, for cases.

⁶ *Grimm v. Hamel*, 2 Hilt. 434. See *Conradi v. Conradi*, L. R. 1 P. & D. 514.

A statute making admissible a certified copy of evidence by a sworn court stenographer is not unconstitutional.¹

III. EXCEPTION AS TO MATTERS OF GENERAL INTEREST.

§ 232. In criminal issues (*e. g.* prosecutions for nuisance) as well as in civil, it may become important to prove certain matters of public interest out of the personal knowledge of living witnesses. In such cases, where there is no ground to suspect fraud, or interest in a pending litigation, the statements of deceased witnesses, cognizant with the facts, may be received.²

Reputation
admissible
as to mat-
ters of
public in-
terest.

IV. EXCEPTION AS TO PEDIGREE AND RELATIONSHIP: BIRTH, MARRIAGE, AND DEATH.

§ 233. To establish pedigree, family hearsay is essential, since if what has been handed down in families cannot be in this way proved, pedigree could not in most cases be proved at all.³

Hearsay
admissible
as to pedi-
gree.

§ 234. In prosecutions for bigamy, hearsay, as we have seen, is a necessary incident of cohabitation. The parties, it is alleged, lived together as man and wife. "They were reputed to be man and wife in the neighborhood," a witness states; "they were addressed as such; they answered when so addressed, accepting the *status* thus given to them; they were talked of in the neighborhood as well as in their family as married." Now this may be all hearsay, yet, in many cases, it is the highest and best evidence that can be obtained. And in many issues in which pedigree is involved it is the only proof obtainable.⁴

Marriage
may be se-
proved.

§ 235. But to the admissibility of declarations when offered to prove legitimacy, in a question of title, it is essential that they should be made by lawful relatives.⁵ The limitation, however, must be restricted to cases in which the object is to establish such declarations as emanating from the family of a particular claimant. In such cases the statement of

Relation-
ship neces-
sary to ad-
missibility.

¹ *State v. Frederic*, 69 Me. 400.

² Whart. on Ev. § 185.

³ Whart. on Ev. § 201.

⁴ See *supra*, § 172.

⁵ Whart. on Ev. § 202.

illegitimate members of the family, or of connections by marriage, will not be received.¹

§ 236. The same reasoning requires us to receive family reputation, duly authenticated, to prove the time of the birth and the time and place of the death of the several members of the family.² A party's age may be proved by his own testimony, based on family reputation.³

Such evidence admissible to prove birth and death.

§ 237. Written declarations of deceased relatives, when not self-serving, are admissible for the same purposes. Among such writings we may notice a provision in a will by a deceased person recognizing or ignoring certain persons as his children; descriptions in a will; an acknowledgment of a deed by certain persons styling themselves heirs at law; recitals in family settlements; recitals of consistent antecedent deeds and wills; and, generally, recitals in a deed executed by a member of the family.⁴

Writings of deceased relative admissible to prove pedigree.

§ 238. Conduct of deceased relatives, involving their attitude to and recognition of persons claimed to be in the same family, is, on the reasoning already given, receivable on such issues; and the manner in which a person has been brought up and treated by his family is here of peculiar weight.⁵

Conduct as well as declarations so admissible.

§ 239. Declarations of the class before us are receivable to prove the facts by which relationship is constituted. Hence, as has been previously stated, it is admissible, in order to prove relationship, to adduce declarations of deceased relatives as to marriages and deaths. Any other family incidents, calculated to fix points of pedigree, will be in like manner admissible.⁶

Declarations may go to the facts from which relationship may be inferred.

§ 240. In civil issues it has been ruled that declarations of deceased relatives, to be admissible in such cases, must have been *ante litem motam*. Yet, in view of the recent statutes admitting parties as witnesses, it is hard to see why the suspicion of concoction, imputable to declarations *post litem motam*, should not be left to the deter-

Declaration must have been *ante litem motam*.

¹ See limitations given Whart. on Ev. §§ 234 *et seq.*

² Whart. on Ev. § 208.

³ Hill v. Eldridge, 126 Mass. 234.

⁴ See Whart. on Ev. § 210.

⁵ Whart. on Ev. § 211.

⁶ Whart. on Ev. § 212.

mination of the jury. There are some pedigree cases so old, that if declarations of deceased persons concerning them be received at all, such declarations must be *post litem motam*; nor is it always possible to determine where the suspicion in question begins.¹

§ 241. If the declarant is living, he must be produced; for if within the process of the court, his declarations, like the declarations of persons against their interest, are inadmissible.²

Declarant
must be
dead.

§ 242. Ancient family records or memorials are admissible, also, to prove pedigree, provided, always, that there is evidence that they have been treated as authoritative by the family, and the parties making the record are dead.³

Ancient
family rec-
ords and
memorials
admissible.

§ 243. For the same purpose it is competent to put in evidence inscriptions on tombstones, and also inscriptions on rings and on portraits, which, if preserved in a family, may be regarded as giving a family tradition, to be received for what it is worth.⁴ As has been already seen,⁵ where the original monument cannot be brought into court, then a copy will be permitted.

So of in-
scriptions
on tomb-
stones and
rings.

§ 244. Charts of pedigree and armorial bearings have in like manner been received, when it is proved they have been kept as family records; though they must be regarded as showing rather what the family claimed to be than what it was.⁶

So of pedi-
grees and
armorial
bearings.

§ 245. In future sections the natural presumptions as to death will be discussed.⁷ It may be here noticed that death may be proved by the continuous and abiding general reputation of the community to which the party belongs, as well as by general family belief.⁸ But to make such reputation or belief admissible it must be general, not limited or special.⁹

Death may
be proved
by reputa-
tion.

§ 246. Reputation in a community, we have already seen,¹⁰ is,

¹ Whart. on Ev. § 213.

⁷ Infra, § 809-14.

² Whart. on Ev. § 215.

⁸ Infra, § 812; and see cases cited in Whart. on Ev. § 223.

³ Whart. on Ev. § 219.

⁹ See infra, § 813; and see Whart. on Ev. § 245 for authorities.

⁴ Whart. on Ev. § 220.

⁵ Supra, § 168.

¹⁰ Supra, §§ 170, 234-5.

⁶ Whart. on Ev. § 219.

So may marriage. when accompanied by cohabitation, among the facts by which a marriage can be proved.

§ 247. Reasoning from the analogy of suits for damages to the husband against a third party for adultery with the wife, we may hold that in criminal prosecutions for adultery it may be admissible, in order to show the relation of the husband and wife before the alleged adultery, to put in evidence, not only their correspondence with each other, but their correspondence with third persons.¹ It is necessary, however, as a prerequisite to the admission of such evidence, that it should be shown, independent of the date appearing on the face of the letters, that they were written prior to any suspicion of misconduct.²

V. EXCEPTION AS TO SELF-DISSERVING DECLARATIONS OF DECEASED PERSONS.

Declarations of deceased persons against their interest receivable. § 248. Declarations of deceased persons made against their interest are, at common law, admissible, although such declarations are offered in suits in which neither such deceased persons, nor those claiming under them, were or are parties.³

No objection that such declarations are based on hearsay. § 249. Such declarations against interest are admissible against third parties, even though the declarant himself received the facts on hearsay, provided the person from whom the hearsay springs was competent to speak.⁴

Declarations must be self-disserving. § 250. It is essential, however, that such declarations, when made, should have been *self-disserving*; i. e. that they should have been, when made, against the pecuniary interests of the declarant.⁵ And in a conspicuous English case, when the declaration of a deceased clergyman was offered on this ground to prove a marriage solemnized by him, the limitation just expressed was rigidly enforced.⁶

¹ Trelawney v. Colman, 2 Stark. R. 191; 1 B. & A. 90, S. C.; Willis v. Bernard, 8 Bing. 376; Winter v. Wroot, 1 M. & Rob. 404, per Ld. Lyndhurst; Taylor's Ev. § 520.

² Whart. on Ev. § 225.

³ Whart. on Ev. § 226.

⁴ Whart. on Ev. § 227.

⁵ Whart. on Ev. § 228.

⁶ Sussex Peerage case, 11 Cl. & F. 112, cited Whart. on Ev. § 250.

VI. EXCEPTION AS TO BUSINESS ENTRIES OF DECEASED PERSONS.

§ 251. It has been just observed that declarations of deceased persons are admissible when made against their interest. We have now to consider the case of business entries of deceased persons ; and as to these it is settled that the memoranda or book entries of an officer, agent, or business man, made when in the due performance of his duties, are evidence, after his death, or after he has passed out of the range of process, of the truth of such entries ; subject, however, to be excluded if it appear that in making the entries he was not registering, but manufacturing, current facts ; and provided such entries were original, contemporaneous, and in the line of the writer's duty.¹

Entries by deceased or absent persons in the course of their business may be evidence.

§ 252. On the same reasoning the notes of deceased counsel of a former trial, and of counsel or other officers who are out of the reach of the process of the court,² are admissible to prove any relevant fact ;³ and the courts have admitted a bank messenger's entries in his book, recording notices given him as messenger, after he has absconded, or is from any cause out of reach of process.⁴

So of counsel and other officers.

§ 253. Entries in the books of deceased notaries when made in the course of their business, and like entries made in notaries' books by deceased clerks, are also admissible.⁵

So of notaries' entries.

VII. EXCEPTION AS TO GENERAL REPUTATION WHEN SUCH IS MATERIAL.

§ 254. Whenever it is material to bring home to a party cognizance of a particular fact, it has been held admissible, under circumstances to be presently noticed, to show that such fact was at the time generally known and talked about in the neighborhood where the party in question resided, or was a matter of common reputation in the business community to which both parties belonged.⁶

General reputation admissible to bring home knowledge to a party.

¹ Whart. on Ev. § 238.

² Whart. on Ev. § 249.

³ Supra, § 231.

⁴ Welsh v. Barrett, 15 Mass. 380 ;
North Bank v. Abbot, 13 Pick. 465 ;

Shove v. Wiley, 18 Pick. 558 ; Wash-
ington Bank v. Prescott, 20 Pick. 339.

⁵ Whart. on Ev. § 251. Supra, §

197.

⁶ Whart. on Ev. § 252.

It is on this ground that proof of notorious usage has been received, as well as evidence of character, when character is introduced as infecting another with notice.¹ Notoriety of a man's intemperance, therefore, is admissible to impute knowledge of such intemperance to a person selling him liquor.² Hence when the issue was whether a person to whom spirituous liquor was illegally sold was an habitual drunkard, evidence of his reputation in this respect was held admissible.³ And when *scienter* is at issue, in a trial for receiving stolen goods, the reputation of the alleged thief is admissible; and he may be shown by the defence to have the reputation of being a regular and fair dealer in the article received.⁴ And common rumor that a party is guilty of a crime is held admissible, in connection with other criminatory evidence, as part of the evidence for the defence in actions of malicious prosecution.⁵ It has also been allowed, on a trial for attempting to produce miscarriage by administering ergot, to prove that ergot was popularly believed to produce miscarriage, the object being to explain the intent.⁶

§ 255. But evidence of general reputation must be in such cases received only as a mode of proving the condition of a particular person's mind as to a certain issue. But inadmissible to prove facts. General reputation is inadmissible to prove any objective fact unless when general reputation is at issue. Thus, when the question is whether certain places or structures are nuisances, general reputation can be admitted neither in proof nor disproof,⁷ though when general reputation is a constituent of the offence it may be proved.⁸ And, as a general rule, evidence of a rumor is inadmissible to justify a libel.⁹ On the other hand, in trespass for destroying a picture, when the plea was not

¹ Supra, § 58.

² Atkins v. State, 60 Ala. 45.

³ Adams v. State, 25 Oh. St. 584.

⁴ Com. v. Gazzolo, 123 Mass. 220.

"Where the question of reasonable cause to believe a person insolvent is in issue, it has been held that the general reputation of such person as to credit and solvency was competent." Morton, J., Com. v. Gazzolo, 123 Mass. 220, citing Bartlett v. De-

creet, 4 Gray, 111; Heywood v. Reed, 4 Gray, 574.

⁵ Pullen v. Glidden, 68 Me. 559.

⁶ Carter v. State, 2 Ind. 617.

⁷ Whart. Crim. Law, 8th ed. §§ 1430, 1451; State v. Foley, 45 N. H. 466; Com. v. Stewart, 1 S. & R. 342; Overstreet v. State, 3 How. (Miss.) 328. Infra, § 261.

⁸ Infra, § 261.

⁹ Whart. on Ev. § 253.

guilty, and the defence that the picture was a libel on the defendant's sister and brother-in-law, and that he had therefore destroyed it, Lord Ellenborough held, "that the declarations of the spectators while they looked at the picture in the exhibition room were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law."¹

§ 256. It may happen that a question at issue is whether certain things were said at a particular time, independently of the truth of what is thus said. If so, proof that such things were said is admissible, though hearsay. Admissible when the issue is hearsay. The question, for instance, is, whether certain acts of violence are excusable; and on such an issue it would be admissible, for the reason here given (if for no other), to prove certain exclamations of terror or of threat, without calling the persons by whom such exclamations were uttered.² And when the issue is whether a railroad officer acted prudently at the time of a collision, there can be no question that cries of alarm uttered at the time, or even telegrams delivered an hour or two before, can be received, if relevant, without calling the persons from whom either cries or telegrams issued.³ Where, in other words, it is material to prove that certain things were said at a particular time, then the saying of these things, though hearsay, is to be proved.

§ 257. Whenever it is material to ascertain the condition of a party's mind at a particular time, statements made to him, accounting for his attitude, are not excluded for the reason that they are hearsay. So to prove condition of party's mind. Threats made by A. of violence to B. are hearsay when repeated by a third party, yet when B. is on trial for injury done, as he alleges in self-defence, to A., it is admissible for him to prove that these threats were communicated to him by such third party.⁴ For the same reason a belief floating about the community, to the effect that A. is a man of great ferocity, is admissible, as we have seen, in the same issue on B.'s behalf.⁵ In fine, when the state

¹ *Du Bost v. Beresford*, 2 Camp. C. & P. 275, cited *infra*, § 272; *Redford v. Birley*, 3 Stark. 88. 511; *Powell's Evidence* (4th ed.), 148.

² *Whart. on Ev.* § 254.

³ See *Com. v. Daley*, Appen. to *Whart. on Hom.*; *R. v. Vincent*, 9

⁴ *Infra*, § 757.

⁵ *Supra*, § 69; *infra*, §§ 756, 757.

of a party's mind is at issue, communications made to such party accounting for his conduct are admissible, though hearsay.¹

Value may
be proved
by hear-
say.

§ 258. As is elsewhere established, hearsay is a primary evidence of value, and in proving value, therefore, it is admissible to resort to hearsay.²

Character
may be
proved by
general
reputation.

§ 259. Whenever character is at issue, then, as is elsewhere more fully seen, evidence of general reputation is admissible. Reputation is in such cases the only mode in which character can be exhibited to us.³

§ 260. Where an offence is laid generally in the indictment, as where the defendant is charged as a common barrator, or a common scold, or as keeping a common gaming-house, or disorderly house, evidence of general reputation is not admissible, it being necessary, to sustain the indictment, that the particular facts which constitute the offence should be proved.⁴ Thus upon the trial of one indicted as a common gambler, evidence that he was and is by reputation "a common gambler" is not admissible; his acts, not his character, are to be shown.⁵ And so, on an indictment for fornication, general reputation in the neighborhood, that the defendant lived in fornication with a woman, is inadmissible.⁶

But not
conclusion
of law, e. g.
nuisance,
gaming-
house,
barratry.

§ 261. On indictments, however, for keeping houses of "ill-fame," when such is the statutory term describing the offence, the "ill-fame" or bad reputation of the house may be put in evidence.⁷ The bad reputation of the visitors is in any view competent evidence.⁸ But of a disorderly

Otherwise
when no-
toriousness
is
at issue.

¹ *Infra*, §§ 540-2; Whart. on Ev. §§ 447-50; *State v. Lull*, 48 Vt. 581, cited *supra*, § 67. Compare *Sheen v. Bumpstead*, 2 H. & C. 193; *Du Bost v. Beresford*, 2 Camp. 511, cited *supra*, § 255; *State v. Wagner*, 64 Me. 178; *Lee v. Kilburn*, 3 Gray, 594; *Bartlett v. Decreet*, 4 Gray, 113.

² Whart. on Ev. §§ 447-50; *Smith v. State*, 48 Iowa, 595.

³ *Supra*, §§ 57 *et seq.*

⁴ *Com. v. Stewart*, 1 S. & R. 342; Archb. C. P. 105. See *R. v. Rogier*, 1 B. & C. 272; 2 D. & R. 431; Whart. *Crim. Law*, 8th ed. §§ 1410 *et seq.*, 1430, 1451.

⁵ *Com. v. Hopkins*, 2 Dana, 418.

⁶ *Overstreet v. State*, 3 How. (Miss.) 328.

⁷ *U. S. v. Gray*, 2 Cranch C. C. 675; *U. S. v. Stevens*, 4 Cranch C. C. 341; *Cadwell v. State*, 17 Conn. 467; *State v. Morgan*, 40 Conn. 44. And so where a statute makes it indictable to keep a house "reputed" to be a tippling-house. *State v. Buckley*, 40 Conn. 246. But see *contra*, *State v. Boardman*, 64 Me. 543; and see *Com. v. Davis*, 11 Gray, 48; *State v. Brunell*, 29 Wis. 435.

⁸ *State v. Boardman*, 64 Me. 543; *State v. McGregor*, 41 N. H. 407;

house the reputation is inadmissible, being secondary evidence of disorder, which is susceptible of immediate proof.¹ Particular acts of disorder, however, are admissible, from which the character of the house may be inferred,² and so may the bad conduct of those frequenting the house.³ But when "notorious adultery" is by statute indictable, proof of notoriety is as material as proof of the fact of adultery in making out the offence.⁴ And so is reputation when the defendant is charged with the statutory offence of being a notorious thief.⁵

VIII. EXCEPTION AS TO REFRESHING MEMORY.

§ 261 *a*. Conversations with third persons may become admissible when introduced for the purpose of identifying fact or dates. But such conversations are not evidence of the truth of facts which they state. They are evidence only on the single point of fixing particular dates, places, or other extrinsic incidents of the facts testified to by the witness.⁶

Collateral
hearsay
admissible
to refresh
memory
as to inci-
dents in
chief.

IX. RES GESTAE.

§ 262. *Res gestae* are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinc-

Res gestae
admissible
though
hearsay.

Com. v. Gannett, 1 Allen, 7; Com. v. Lambert, 12 Allen, 177; Com. v. Kimball, 7 Gray, 328; Harwood v. People, 26 N. Y. 190; O'Brien v. People, 28 Mich. 213; State v. Brunell, 29 Wis. 435; Clementine v. State, 14 Mo. 112; Morris v. State, 38 Tex. 603; Sylvester v. State, 42 Tex. 496.

¹ U. S. v. Jourdane, 4 Cranch C. C. 338; State v. Foley, 45 N. H. 466; Com. v. Stewart, 1 S. & R. 342; Com. v. Hopkins, 2 Dana, 418. Supra, § 255.

² Com. v. Davenport, 2 Allen, 299; Com. v. O'Brien, 8 Gray, 487; Com. v. Cardoze, 119 Mass. 210; Com. v. Stewart, 1 S. & R. 342; State v. Webb, 25 Iowa, 231; State v. Patterson, 7 Ired. 70; Mahalovitch v. State, 54 Ga. 217.

³ Com. v. Kimball, 7 Gray, 328; State v. Patterson, 7 Ired. 70.

⁴ People v. Gates, 46 Cal. 52; Whart. Crim. Law, 8th ed. § 1747.

⁵ World v. State, 50 Md. 49.

⁶ See Whart. on Ev. §§ 258, 519.

tively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself. And as long as the transaction continues, so long do acts and deeds emanating from it become part of it, so that in describing it in a court of justice they can be detailed. The question is, is the evidence offered that of the event speaking through participants, or that of observers speaking about the event. In the first case, what was thus said can be introduced without calling those who said it; in the second case, they must be called. Nor are there any limits of time within which the *res gestae* can be arbitrarily confined. They vary, in fact, with each particular case. If in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestae* of the collision are confined within the few moments that it occupies. But when there is a social feud, in which two religious factions, as in the case of the Lord George Gordon disturbances, or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and are so absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestae* as the blows given in the homicides for which particular prosecutions may be brought.¹

§ 263. The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. They need not be coincident as to time, if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate. In other words, they must stand in immediate causal relation to the act, and become part either of the action immediately producing it, or of action which it immediately produces. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this

¹ See rulings substantially to this effect in *Com. v. Sherry* and *Com. v. Daley*, reported in the Appendix to Whart. on Homicide. See *R. v. Gordon*, 21 How. St. Tr. 542. *Infra*, § 263. As to *res gestae* in relation to confessions see *infra*, § 691; in relation to dying declarations, *infra*, § 296. Compare *Nutting v. Page*, 4 Gray, 584; *Meek v. Perry*, 36 Miss. 190.

way evidence of the character of the act.¹ Under the rule before us evidence on homicide trials has been received of the exclamations of the defendant at the time of the attack;² of the cries of the deceased and of others assaulted at the same time;³ of statements of the deceased, at the time or so soon afterwards as to preclude the hypothesis of concoction or premeditation, charging the defendant with the act.⁴ In order, also, to rebut the pre-

¹ U. S. v. Craig, 4 Wash. C. C. 729; U. S. v. O'Meara, 1 Cranch C. C. 165; State v. Wagner, 61 Me. 178; Com. v. Williams, 105 Mass. 62; Com. v. Vosburg, 112 Mass. 419; Russell v. Frisbie, 19 Conn. 205; Haight v. Haight, 19 N. Y. 464; Hunter v. State, 40 N. J. L. 495; Brown v. Com. 76 Penn. St. 319; Haynes v. Com. 28 Grat. 942; State v. Ridgely, 2 Har. & McH. 120; Comfort v. People, 34 Ill. 404; Dawson v. People, 90 Ill. 222; Hamilton v. State, 36 Ind. 281; Binns v. State, 57 Ind. 46; People v. Marble, 38 Mich. 117; State v. Porter, 34 Iowa, 131; State v. Tilly, 3 Ired. 424; State v. Huntly, 3 Ired. 418; State v. Rawles, 65 N. C. 334; Mitchum v. State, 11 Ga. 615; Stiles v. State, 57 Ga. 183; Allen v. State, 60 Ala. 19; Head v. State, 44 Miss. 731; State v. Graham, 46 Mo. 490; State v. Testerman, 68 Mo. 408; State v. Thomas, 68 Mo. 605; State v. Evans, 65 Mo. 574; State v. Thomas, 30 La. An. 600; State v. Winner, 17 Kans. 298; People v. Vernon, 35 Cal. 49; State v. Garrand, 5 Oreg. 216. *Infra*, §§ 691-2.

² See O'Mara v. Com. 75 Penn. St. 424; Mitchum v. State, 11 Ga. 615; People v. Roach, 17 Cal. 297.

³ State v. Wagner, 61 Me. 173; Bradshaw v. Com. 10 Bush, 576; People v. Murphy, 45 Cal. 137.

⁴ *Supra*, § 296; Com. v. McPike, 3 Cush. 181; State v. Nash, 10 Iowa, 81.

In Com. v. McPike, the statement admitted by the court as part of the

res gestae (a statement charging the defendant with having stabbed the deceased) was not made by the deceased until after the witness, who had gone for a policeman immediately after the stabbing, had time to return. This case is rejected as authority by Cockburn, C. J., in the pamphlet hereafter noticed.

In Hunter v. State, 40 N. J. L. 495, the man afterwards murdered made statements to his son, and wrote a note to his wife, a few hours before leaving home on the night of the murder, to the effect that he was going to the city of C. on business, and that the prisoner was going with him. It was held that such statements, both oral and written, were admissible as explanations and preparations of the act of going from home.

In State v. Hayden, Superior Court of New Haven, Jan. 1880 (9 Reporter, 237), it was held by Park, C. J., that declarations made by the deceased, whose murder was charged upon defendant, that she was going to see the defendant (made while in the act of going) and inform him of her pregnancy by him, and say to him that he must do something for her, are competent to characterize her act of going; and that when the act and the declaration are thus united, the whole becomes a fact in the case.

It was further ruled that declarations made by the deceased that she was going to the place, where she was subsequently found murdered, to take "quick medicine," to be given her by

sumption arising from the possession of stolen property, declarations of the parties at the time of the reception of the property,

the defendant in order to procure an abortion, made while in the act of going, are competent to characterize her act of going. Compare, however, the limitations expressed *supra*, § 225.

How far statements of a dying person may be regarded as dying declarations is considered *infra*, § 296.

An analogous extension of the rule in the text was made in *Com. v. Piper*, 120 Mass. 185, where the issue being whether a witness saw the defendant jump from a window about the time of the commission of the murder, it was held competent for the prosecution to show, for the purposes of identification, that shortly after the event the witness pointed out the window to an officer.

In *R. v. Bedingfield*, to be hereafter more fully noticed (*infra*, § 296), the defendant was indicted for killing the deceased by cutting her throat. The prosecution offered to prove that (to adopt the statement of Cockburn, C. J.) the deceased, "some ten or fifteen minutes before her death, coming from her house, at a distance of from fifteen or twenty yards from her door, holding her apron to her throat," exclaimed, "Oh, dear aunt, see what Bedingfield has done," Bedingfield not being at the time present. This was rejected by Cockburn, C. J., as admissible neither as part of the *res gestae* nor as a dying declaration; he having in this ruling the concurrence of Field and Manisty, JJ., whom he consulted. The ruling was criticised, as we shall hereafter see, by Mr. Pitt Taylor, and defended by the chief justice in a pamphlet published in December, 1879. *Infra*, § 296. From this pamphlet the following is extracted:—

"What then are these limits, and

where, looking to the law as it exists, are we to draw the line? In other words, what is the meaning of the term *res gestae* as applied to a criminal case? To this I should propose to answer thus:—

"Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrong-doer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive, *e. g.* in the case of flight or applications for assistance, form part of the principal transaction, and may be given in evidence as part of the *res gestae* or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention, or its abandonment by the wrong-doer, such as *e. g.* statements made with a view to the apprehension of the offender, do not form part of the *res gestae*, and should be excluded.

"Whatever, whether act or words, forms part and parcel of the fact which is the subject of the judicial inquiry presents no difficulty. Words uttered during the continuance of the

as to a proposed sale can be received.¹ On the same principle, the cries of a mob, led by parties tried afterwards for riot and unlawful meeting, can be received against the defendants, no matter at what time during the continuance of the riot such cries were uttered.² But the comments and criticisms of observers cannot be introduced as *res gestae*. Such persons must be called in court and examined as to what they saw. Their statements, made at the time, are hearsay.³

§ 264. The rule before us, however, does not permit the in-main action, whether by the active or the passive party, though they cannot amount to acts for which the accused can be held responsible, yet may so qualify or explain the act or acts they accompany, that they become essential to the due appreciation of them. There is every reason, therefore, for considering words so spoken during the doing of the act charged as the offence, as part and parcel of the act itself. Moreover, words so spoken are generally admissible on another ground, clearly not open to exception, namely, that they are uttered in the presence and hearing of the accused. But even where the accused is no longer present, if the words are the immediate and natural effect and consequence of continuing action on his part, though uttered out of his hearing, they may well be considered as part of the transaction. Thus, to illustrate what I mean by a case not unlikely to occur: If a party assailed should succeed in escaping from the immediate attack and presence of his assailant, and should, while apprehending immediate danger, make a declaration in his flight with a view to obtaining assistance, such a declaration would be admissible, but not so if the declaration were made after all pursuit or danger had ceased. Or, to take another not unlikely case: A man is awoke in the night by hearing sounds as of some one breaking in at the

back of his premises. He hastens to a back window, and sees a man whom he knows endeavoring to break in. He rushes to a front window opening to the street, and calls to a passer-by or to a neighbor for assistance, stating who it is that is breaking in. Or a man finds himself waylaid by another who makes a murderous assault on him; whereupon, succeeding in making his escape, he flies, and, outrunning his assailant, applies to the first person he meets for protection, stating what has happened and who it is that has assailed him, and from whom he apprehends danger. In either of such cases, I should have no hesitation in holding the statement to be properly part of the *res gestae*. The statement is the immediate effect of the continuing, at all events constructively continuing, act of the wrong-doer. But if, in either of these cases, on the alarm being given, the wrong-doer were to desist and take to flight, statements subsequently made by the injured party to third persons would, I think, stand on an entirely different footing." *R. v. Foster*, 6 C. & P. 325, cited to the point in the text, and criticised by Cockburn, C. J., is hereafter discussed. *Infra*, § 492.

¹ *Leggett v. State*, 15 Ohio, 283.

² *R. v. Gordon*, 21 How. St. Tr. 535. *Infra*, §§ 690-1.

³ *Bradshaw v. Com.* 10 Bush, 576; *People v. Murphey*, 45 Cal. 137.

troduction, under the guise of *res gestae*, of a narrative of past events, made after the events are closed by either the party injured or by by-standers.¹ But we must again remember that continuousness cannot always be measured by time. In this view we can understand the comments of Lord Denman,² concurring in a prior remark of Parke, B.,³ “that it is impossible to tie down to time the rule as to the declarations” that may be made part of the *res gestae* in cases of bankruptcy; to which Lord Denman added, “that if there be connecting circumstances, a declaration may, even at a month’s interval, form part of the whole *res gestae*.”⁴

Narratives
not part of
res gestae.

§ 265. The rule before us is not to be limited to declarations explanatory of crimes. To business relations, also, the same test is applicable, — declarations which are the immediate accompaniments of an act being admissible as part of the *res gestae*; remembering that immediateness is tested by closeness, not of time, but by causal relation as just explained.⁵

Coincident
business
declara-
tions re-
ceivable.

§ 266. What is done is part of the *res gestae* as much as is what is said; and on this additional ground is explained a famous ruling, elsewhere noticed, that without pro-

What is
done or ex-
hibited at

¹ *Infra*, § 691; *Hyde v. Palmer*, 8 B. & S. 657; *Com. v. Cooper*, 5 Allen, 95; *Com. v. James*, 99 Mass. 438; *Hays v. State*, 40 Md. 633; *Gardner v. People*, 3 Scam. 88; *Cross v. People*, 47 Ill. 152; *Dukes v. State*, 11 Ind. 557; *Binns v. State*, 57 Ind. 45; *Tipper v. Com.* 1 Metc. (Ky.) 6; *Riggs v. State*, 6 Cold. 517; *Hall v. State*, 48 Ga. 698; *Chaney v. State*, 31 Ala. 342; *Hall v. State*, 40 Ala. 698; *Steele v. State*, 61 Ala. 213; *Scaggs v. State*, 8 Sm. & M. 722; *State v. Schneider*, 35 Mo. 535; *State v. Brown*, 64 Mo. 367; *People v. Symonds*, 19 Cal. 275.

“But when the declarations offered are merely narratives of past occurrences, they are incompetent. 1 Greenl. Ev. § 110. That is precisely this case. The declarations given in evidence were a mere statement of

what had been done at the doctor’s office, and not any part of what was then done, and therefore no part of the *res gestae*. See *Insurance Company v. Mosely*, 8 Wall. 397, where a somewhat elaborate review of the authorities upon this point will be found in the opinions of the judges, and where the doctrine as to what may be regarded as part of the *res gestae* was certainly carried to its utmost limit by a majority of the court.” *Grover, J., People v. Davis*, 56 N. Y. 102. See *Lees v. Martin*, 1 M. & Rob. 210.

² *Rouch v. R. R.* 1 Q. B. 51.

³ *Rawson v. Haigh*, 5 Bing. 104; S. C., 9 Moore, 217.

⁴ See *Ridley v. Gyde*, 9 Bing. 349.

⁵ Whart. on Ev. § 262.

That declarations coincident with torts are receivable see fully illustrated in Whart. on Ev. § 263.

ducing flags exhibited at seditious meetings the inscriptions on such flags could be proved ; ¹ for such inscriptions used on such occasions are the public expression of the sentiments of those who bear them, and have rather the character of speeches than of writings.²

the occurrence may be so proved.

§ 267. The test of secondariness does not apply in such cases. Thus a foreign proclamation, on a printed placard, is treated as an inscription or act done at such time, and may be proved by oral evidence or an examined copy.³

Test of secondariness does not apply.

§ 268. Statements concocted in advance, as part of a projected scheme of crime, are clearly not within the exception.⁴ Such statements are inadmissible as self-serving, and cannot, therefore, be introduced by the defendants on their own behalf. They may be put in evidence, however, by the prosecution, when the object is to prove premeditation and preparation on part of the defendants.⁵

Statements in preparation of crime inadmissible.

§ 269. A declaration, also, is inadmissible for the purpose of explaining an unexecuted intent, unless the subjective condition of the party's mind is at issue.⁶ And when the quality or tone of an overt act is at issue, declarations as to such act cannot be proved, unless proof of the act itself is admissible, and the act is itself proved.⁷

Declarations inadmissible to explain inadmissible acts.

§ 270. The narrative of a mere witness to a transaction is not, in any view, to be received as part of the *res gestae*, if the witness is himself obtainable on trial.⁸ The opinions of a by-stander, if admissible, must be proved by calling him as a witness.⁹ It does not follow, however, as we will hereafter see, that because a defendant may testify as a witness, therefore his declarations are inadmissible, nor, as has been already noticed, is it necessary, in proving cries at a particular moment of excitement, to call the persons by whom the cries were made.¹⁰

Narration of a witness inadmissible when the witness could himself be produced.

¹ Supra, § 81.

² R. v. Hunt, 3 B. & Ald. 574.

³ Bruce v. Nicolupolo, 11 Ex. 129.

⁴ Whart. on Ev. § 268.

⁵ Infra, § 753.

⁶ Hall v. State, 48 Ga. 607; Caw v. People, 3 Neb. 357. See Hale v. Tay-

lor, 45 N. H. 405; Lund v. Tyngsborough, 9 Cush. 36.

⁷ Whart. on Ev. § 266.

⁸ Whart. on Ev. 267.

⁹ Supra, § 263; Detroit R. R. v. Van Steinburg, 17 Mich. 99.

¹⁰ Supra, § 256.

X. EXCEPTION AS TO DECLARATIONS CONCERNING PARTY'S OWN HEALTH AND STATE OF MIND.

§ 271. The character of an injury may be explained by exclamations of pain and terror at the time the injury is received, and by declarations as to its cause.¹ When, also, the nature of a party's sickness or hurt is in litigation, his instinctive declarations to his physician, or other attendant, during such sickness, may be received.² Immediate groans and gestures are in like manner admissible.³ But declarations made after convalescence, or when there has been an opportunity to think over the matter in reference to projected litigation, are inadmissible.⁴ Thus in an action for carnally knowing the plaintiff, a girl of ten years, by force, and giving her the venereal disease, the plaintiff's statements made to a physician, three months after the event, have been ruled out.⁵ But where such subsequent declarations are part of the case on which the opinion of the physician, as an expert, is based, they have been received.⁶ Except, however, for the purpose of indicating symptoms, declarations of this class are not evidence,⁷ though they may be received to prove the condition of a party's health prior to an alleged poisoning.⁸ Such declarations must be given in their substance, and cannot be interpreted by the witness. Of this position we have an extreme illustration in a New York

¹ *Aveson v. Kinnauld*, 6 East, 188; *R. v. Blandy*, 18 How. St. Tr. 1135; *R. v. Guttridge*, 9 C. & P. 472; *State v. Wagner*, 61 Me. 178; and other cases cited in Whart. on Ev. § 268. *Supra*, § 252.

² *Com. v. McPike*, 3 Cush. 181; *People v. Williams*, 3 Parker C. R. 84; *Pierson v. People*, 18 Hun, 247; *Edington v. Ins. Co.* 67 N. Y. 185; *State v. Glass*, 5 Oregon, 73; *Johnson v. State*, 17 Ala. 618. See, however, *Witt v. Witt*, 3 Swab. & Tr. 143, where letters written by a patient, describing his situation to his physician, were rejected.

³ *Bacon v. Charlton*, 7 Cush. 581; *Hyatt v. Adams*, 16 Mich. 180; *State v. Porter*, 34 Iowa, 131.

⁴ Whart. on Ev. § 268.

⁵ *Morrissey v. Ingham*, 111 Mass. 63.

⁶ *Barber v. Merriam*, 11 Allen, 322. Compare *Ashland v. Marlborough*, 99 Mass. 47; though see *Rogers v. Crain*, 30 Tex. 289.

⁷ *Collins v. Waters*, 54 Ill. 485.

⁸ *R. v. Johnson*, 2 C. & K. 354; *R. v. Blandy*, 18 How. St. Tr. 1135.

See, however, *Smith v. State*, 53 Ala. 486, where it was ruled that on the trial of a husband for poisoning his wife, it was inadmissible for the prosecution to prove that the wife, the day before her decease, while suffering intense pain, stated that she was taken sick that morning after eating breakfast. For other cases see *infra*, § 296.

case, in which, the defendant being on trial for murder, and a witness having testified that he heard cries issuing from the house on the night of the killing, it was held that the witness could not be asked what the cries indicated.¹

§ 272. We have just seen ² that, for the purpose of exhibiting such condition of mind, statements made to such party by third persons may be admissible. We have now to recognize the position that, to determine such condition of mind, it is admissible to put in evidence such expressions of the party as may be shown to have been instinctive, and not to have been uttered for the purpose of producing a particular effect.³ So, when the extent of a mental or other disease is in controversy, are contemporaneous declarations of the person so affected,⁴ though not as to conditions of prior diseases;⁵ and so, when the *bona fides* of a transaction is in question, are instinctive and unpremeditated declarations of parties

When condition of a person's mind is at issue, his statements may be proved.

¹ *Messner v. People*, 45 N. Y. 1. But see *infra*, §§ 457-8; *supra*, § 263.

² *Supra*, § 256.

³ See cases cited in last section, and *Com. v. O'Connor*, 11 Gray, 94; *Rowell v. Lowell*, 11 Gray, 420; *Liles v. State*, 30 Ala. 24; *State v. Hays* 22 La. An. 39; *People v. Shea*, 8 Cal. 538; and other cases cited *Whart. on Ev.* § 269.

On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble for the purpose of exciting terror in the minds of her Majesty's subjects, evidence was given of several meetings at which the defendants were present, and it was proposed to ask a witness, who was superintendent of the police, whether persons complained to him of being alarmed by these meetings. It was held that the evidence was receivable, and that it was not necessary to call the persons who made complaints. *R. v. Vincent*, 9 C. & P. 275.

⁴ See *supra*, § 271; 1 *Whart. & St. Med. Jur.* § 286 (3d ed.); *Perkins v.*

R. R. 44 N. H. 223; *Howe v. Howe*, 99 Mass. 88; *Ill. Cent. R. R. v. Sutton*, 42 Ill. 438; *Stone v. Watson*, 1 Ala. (Sel. Cas.) 236; *State v. Kring*, 64 Mo. 591.

In *R. v. Johnson*, 2 C. & K. 354, the prisoner was charged with having murdered her husband, and, in order to prove the state of health of the deceased prior to the day of his death, a witness was called who had seen him a day or two before that time; and on this witness being asked in what state of health the deceased appeared to be when he last saw him, he began to state a conversation which had then taken place between the deceased and himself on this subject. This was objected to on behalf of the prisoner, but Alderson, B., said that he thought that what the deceased person said to the witness was reasonable evidence to prove his state of health at the time. *Roscoe's Crim. Ev.* 8th ed. § 31.

⁵ *Chapin v. Marlborough*, 9 Gray, 244; *Stewart v. Redditt*, 3 Md. 67.

during the negotiations, as touching such *bona fides*.¹ In life insurance cases the party's views as to his condition may be thus shown.² And as will hereafter be seen,³ the declarations of a deceased person may be proved to show that the defendant, charged with killing such person, acted in self-defence.

§ 273. In prosecutions for rape, where the party injured is a witness, it is material to show that she made complaint of the injury while it was yet recent. Proof of such complaint, therefore, is original evidence ;⁴ but whether the statement made by the prosecutrix of details and circumstances is admissible has been doubted.⁵

§ 274. Cases may arise in which it is important to determine whether an act was done with the consent of a third person. "Although at one time," says Mr. Roscoe,⁶ "it appears to have been thought necessary to call the party himself, it is now settled that the want of consent may be proved in other ways. Where on an indictment under 6 Geo. 3, c. 36 (repealed), for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave any consent, and from all he had heard his master say (who had died before the trial, having given orders for apprehending the prisoners on suspicion), he believed that he never did : Bayley, J., left it to the jury to say, whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of night when the offence was committed, and to the cir-

¹ Banfield v. Parker, 36 N. H. 353; Zabriskie v. Smith, 13 N. Y. 322.

² Aveson v. Kinnard, 6 East, 188. See Witt v. Klindworth, 3 S. & T. 143.

³ Infra, §§ 756-7.

⁴ R. v. Brazier, 1 East P. C. 444; R. v. Clarke, 2 Stark. 241; R. v. Guttridge, 9 C. & P. 471; R. v. Megson, 9 C. & P. 420; R. v. Walker, 2 M. & Rob. 212; R. v. Osborne, C. & M. 622; State v. Knapp, 45 N. H. 148; State v. Niles, 47 Vt. 82; People v. McGee, 1 Denio, 19; Baccio v. People, 41 N. Y. 265; People v. Croucher, 2 Wheel. C. C. 42; Johnson v. State, 17 Ohio,

593; Laughlin v. State, 18 Ohio, 99; McCombs v. State, 8 Oh. St. 643; Phillips v. State, 9 Humph. 246; Nugent v. State, 18 Ala. 521; Lacy v. State, 45 Ala. 80; State v. Scott, 48 Ala. 420; Hogan v. State, 46 Miss. 274; State v. Jones, 61 Mo. 232; Pef-ferling v. State, 40 Tex. 486; Pleasant v. State, 15 Ark. 624. See Whart. Crim. Law, 8th ed. § 566.

⁵ Ibid. As affirming such admissibility see R. v. Wood, 14 Cox C. C. 46; and see fully Whart. Crim. Law, 8th ed. § 566.

⁶ Criminal Evidence, 8th ed. § 6.

cumstance of the prisoners running away when detected, as evidence to show that the consent required had not in fact been given.”¹

XI. DYING DECLARATIONS.

§ 276. The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are admissible in prosecutions for killing the person making the declarations: (1.) Though the prosecution be for manslaughter;² and (2.) Though the accused was not present when they were made, and had no opportunity for cross-examination;³ and they may be received either against or in favor of the party charged with the death.⁴ For it is argued that when an individual is in constant expectation of immediate death, all temptation to falsehood, either from interest, hope, or fear, will be removed; and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice.⁵ Yet, in dealing with this kind of evidence, one or two preliminary cautions should be observed. Passions and prejudices, which in life pervert the perceptive faculties, do not always lose their power on

¹ The prisoners were found guilty. *R. v. Hazy*, 2 C. & P. 458. So on an indictment on 42 Geo. 3, c. 107, s. 1 (now repealed), for killing fallow-deer without consent of the owner, and on two other indictments, for taking fish out of a pond without consent, evidence was given that the offence was committed under such circumstances as to warrant the jury in finding non-consent; and the persons engaged in the management of the different properties were called, but not the owners. The judges held the convictions right. *R. v. Allen*, 1 Mood. C. C. 154.

² *State v. Hanna*, 10 La. An. 131.

³ See 1 Phil. Ev. 223; 1 Stark. Ev. 101; *People v. Green*, 1 Denio, 614; 1 Park. C. R. 11; *State v. Brunetto*, 13 La. An. 45, and cases hereafter cited.

⁴ See *infra*, § 304.

⁵ 1 Leach, 502; 1 Gilb. Ev. 280; 1 Chit. C. L. 568, 569; *People v. Davis*, 56 N. Y. 95; *Com. v. Murray*, 2 Ashm. 42; *Com. v. Williams*, *Ibid.* 69; *Brown v. Com.* 73 Penn. St. 321; *Kehoe v. Com.* 85 Penn. St. 127; *Small v. Com. S. Ct. Penn.* 1879; *State v. Nash*, 7 Iowa, 347; *Donelly v. State*, 2 Dutch. 463; *Walston v. Com.* 16 B. Monr. 15; *State v. Scott*, 12 La. An. 274; *People v. Lee*, 17 Cal. 76; *People v. Ybarra*, 17 Cal. 166; *Benavides v. State*, 31 Tex. 579; *Hill v. State*, 41 Ga. 484; *Walker v. State*, 52 Ala. 192; *May v. State*, 55 Ala. 39; *Dunn v. State*, 2 Pike, 229; *Scott v. People*, 63 Ill. 508; *Hurd v. People*, 25 Mich. 105; *People v. Knapp*, 26 Mich. 112; *State v. Oliver*, 2 Houst. 585; *Watson v. State*, 63 Ind. 548.

the death-bed.¹ The parties executed for complicity in Barclay's conspiracy to murder William III. united on the scaffold in statements whose falsity can only be explained by violent political passion, and the same criticism may be made on the conflicting statements of dying rioters. It should be remembered that cross-examination, when a witness is produced in court, gives a process by which delusions can be dissipated. But no such process exists by the death-bed. The witnesses who catch up these statements are generally friends of and sympathizers with the dying man, eager to encourage and preserve any remarks he may drop, no matter how incoherent or feverish, which may vindicate him, or implicate a common object of hate; nor by such witnesses is it likely that questions would be asked as to the grounds of the declarant's belief. Nor can it always be said that the consciousness of the near approach of death is an equivalent to an oath administered on the witness stand. A witness sworn in court knows that he may be convicted of perjury if he testifies falsely. A dying man, if he believes in a future retribution, will speak, if his faculties are unimpaired, under a similar

¹ "With respect to the effect of dying declarations, it is to be observed that, although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, al-

though possibly not influenced by animosity or ill-will. But it cannot be concealed, that animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. See *R. v. Crockett*, 4 C. & P. 544, where the declaration was, 'that damned man has poisoned me,' which may be presumed to be vindictive; and *R. v. Bonner*, 6 C. & P. 386, where the dying declaration was distinctly proved to be incorrect. Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state, especially when it is considered that they cannot be subjected to the power of cross-examination, — a power quite as necessary for securing the truth as the religious obligation of an oath can be." *Roscoe's Cr. Ev.* 36.

sanction; but all dying men do not retain their faculties unimpaired, nor do all dying men believe in a future state of retribution. Convicts on the scaffold have, as a class, as little hope of reprieve as any persons on the eve of death; yet there is no kind of evidence so unreliable as the last speeches of convicts on the scaffold. The weight, therefore, to be attached to dying declarations depends upon these conditions: (1.) The trustworthiness of the reporters; (2.) The capacity of the declarant at the time to remember accurately the past; and (3.) His disposition truly to tell what he remembers. It is true, that by statute in most of our States, disbelief in a future retribution no longer disqualifies a witness; and that it is consequently held in such States that such disbelief does not affect the admissibility of dying declarations. It is true, also, that the law is that the court is required, as will presently be seen, to admit the declarations if the deceased would have been competent as a witness, and if he spoke under a consciousness of approaching dissolution. But when the declarations are received, their credibility and weight are for the jury; and in view of the exceptional character of the testimony, and its liability to perversion, it is proper that it should be carefully exposed to all of the tests just enumerated.¹

§ 277. The constitutional provision, that the accused shall be confronted by the witnesses against him, does not abrogate the common law principle that the declarations *in extremis* of the murdered person, in such cases, are admissible in evidence.²

Evidence does not conflict with limitation of Constitution.

§ 278. Dying declarations are admitted, from the necessity of the case, to identify the prisoner and the deceased,³ to establish the circumstances of the *res gestae*, and to show the transactions from which the death results; when they relate to former and distinct transactions they do not come within the principle of necessity.⁴ Therefore it seems that dying declarations by a party

But such declarations cannot be received to prove facts distinct from and prior to homicide.

¹ See *Walker v. State*, 37 Tex. 367; 42 Tex. 360.

² *Robbins v. State*, 8 Oh. St. 131; *State v. Nash*, 7 Iowa, 347; *Miller v. State*, 25 Wis. 384; *State v. Dickinson*, 41 Wis. 299; *Campbell v. State*,

11 Ga. 355; *Woodsides v. State*, 2 How. (Miss.) 655; *Anthony v. State*,

1 Meigs, 265.

³ *Lister v. State*, 1 Tex. Ap. 739; *State v. Hamilton*, 27 La. An. 400.

⁴ *R. v. Mead*, 2 B. & C. 605; *R. v.*

that the prisoner had, two or three times previously, attempted to kill him, are not admissible.¹ And so when they go to show old malice on part of the prisoner to the deceased.²

§ 279. Yet it is competent to detail collateral remarks, on the part of the declarant, made at the time of the uttering of the declarations as to the homicide, when such collateral declarations tend to sustain the declarant's mental capacity. Thus, in a case in the Supreme Court of New Jersey, in 1857, Chief Justice Green said: "If it be true, as was proved by experts called by the defence, that the injury sustained by the deceased was calculated to derange the mental faculties, it was competent for the State to meet the objection *in limine*, and to show by his acts and words that he was laboring under no hallucination, and that his mental faculties were unimpaired."³

§ 280. Whether, when it is alleged that A. and B. were mortally wounded at the same time, by the same agency, the dying declarations of A. are admissible on the trial of C. for killing B., has been the subject of some conflict of opinion. The admissibility of such declarations has been affirmed by high authority,⁴ but elsewhere, and with good reason, denied.⁵ For if the restriction confining such declarations to the utterances of the party whose death is charged in an indictment be removed to this extent, it would render admissible the dying declarations of all persons whose death occurred in the same general transaction as that in which the deceased

Hind, Bell C. C. 253; 8 Cox C. C. 300; State v. Shelton, 2 Jones (N. C.), 360; Johnson v. State, 17 Ala. 618; Ben v. State, 37 Ala. 103; Leiber v. State, 9 Bush, 11; Luby v. Com. 12 Bush, 1.

In Texas it has been held that dying declarations of the deceased are competent to prove his name as alleged in the indictment. Leister v. State, 1 Tex. Ap. 739.

¹ Nelson v. State, 7 Humph. 542; State v. Draper, 65 Mo. 335.

² Mose v. State, 35 Ala. 421; though

see Donelly v. State, 2 Dutch. 463, 601.

³ Donelly v. State, 2 Dutch. 496.

⁴ R. v. Baker, 2 M. & R. 53; State v. Terrell, 12 Rich. 321; State v. Wilson, 23 La. An. 558; the first two being cases of poisoning.

⁵ Brown v. Com. 73 Penn. St. 321; State v. Westfall, 49 Iowa, 328; State v. Bohan, 15 Kans. 407; State v. Fitzhugh, 2 Oreg. 227. See Hackett v. People, 54 Barb. 370; Hudson v. State, 3 Cold. 355. See *infra*, § 288.

died. The dying declarations of persons killed in great as well as in little riots, for instance, would become competent testimony; and, in prosecutions for riotous homicide, the case would be flooded by the last words of men who, from their participation in the common excitement, are almost the last to be received as witnesses without the solemnity of a trial, or the criticism of a cross-examination. For it should be remembered that the agonies of death, while they often bring gravity and conscientious carefulness to persons dying under an isolated and exceptional blow, tend only to intensify the partisan sympathies of those sacrificed with others, as they suppose, on behalf of a common cause in whose passions they are steeped. So, in cases where it is alleged that a number of persons are poisoned by the defendant's act, to admit such testimony would prejudice the case by the introduction of independent crimes, and put the defendant on his trial for two or more homicides instead of one. And even where this objection does not apply, we must remember that the dying declarations of third persons stand in a different position from the dying declarations of the deceased. The latter is to such an extent a party that his statements may often be proved by parol; the statements of deceased third persons can only be received when such statements were made under oath. To remove the latter restriction would be to substitute death-beds for the witness-box, and to make the dying hours the period in which all persons knowing anything about a case should be interviewed on the subject. If such examinations are to be taken, this should be done by way of deposition before a competent officer, and not by visitors, often prejudiced, and incapable of exact and trustworthy examination.¹

§ 281. The declarant, to render his declarations admissible, must have uttered them under the sense of impending dissolution,² and with a consciousness of the awful occa-

Must be a
solemn
sense of

¹ See *Stobart v. Dryden*, 1 M. & W. 615, 626; *Best's Ev.* 5th ed. 637.

² *R. v. Woodcock*, 1 Leach, 500; *R. v. Welburn*, 1 East P. C. 358; *R. v. Van Butchell*, 3 C. & P. 629; *Com. v. Densmore*, 12 Allen, 535; *Maine v. People*, 16 N. Y. Sup. Ct. 113; *Davis v. People*, 12 Thomp. & C. 212;

Com. v. Williams, 2 Ashm. 69; *Kilpatrick v. Com.* 31 Penn. St. 198; *Com. v. Britton*, 1 Leg. Gazette, 513; *Robbins v. State*, 8 Oh. St. 131; *Starkey v. People*, 17 Ill. 17; *Scott v. People*, 63 Ill. 508; *Hay v. State*, 40 Md. 633; *Hill's case*, 2 Grat. 594; *Moore v. State*, 12 Ala. 764; *Walker v. State*,

impending dissolution.

sion,¹ though the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made.² Hence where a party expressed an opinion that she would not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would "rise again;" it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible.³

§ 282. But it is not necessary to prove expressions implying apprehension of immediate danger, if it be clear that the party does not expect to survive the injury,⁴ which may be collected from the general circumstances of his condition,⁵ as when the party was a member of the Roman Catholic Church, and had confessed, been absolved, and received extreme unction, before making the declaration.⁶ The same view was taken in an Eng-

52 Ala. 192; *Faire v. State*, 58 Ala. 74; *Nettles, ex parte*, 58 Ala. 268; *Nelson v. State*, 7 Humph. 542; *Brakefield v. State*, 1 Sneed, 215; *Brown v. State*, 32 Miss. 433; *Dixon v. State*, 13 Fla. 636; *State v. Simon*, 50 Mo. 370; *People v. Ah Dat*, 49 Cal. 652; *People v. McLaughlin*, 44 Cal. 435; *Edmondson v. State*, 41 Tex. 496; *State v. Garrand*, 5 Oreg. 216. The determination of the question whether there was such a sense of impending dissolution is primarily for the court; but when the evidence is admitted this is properly a topic for the consideration of the jury under the directions of the court. The relation of this topic to that of the *res gestae* is discussed *supra*, §§ 226, 254; *infra*, § 296.

¹ *R. v. Pike*, 3 C. & P. 598; *R. v. Crockett*, 4 C. & P. 544; *R. v. Hayward*, 6 C. & P. 157; *R. v. Spilsbury*, 7 C. & P. 187; *R. v. Whitworth*, 1 F. & F. 382; *R. v. Forester*, 4 F. & F. 857; *S. C.*, 10 Cox C. C. 368; *R. v. Mackay*, 11 Cox C. C. 148; *Brother-*

ton v. People, 75 N. Y. 159; *Montgomery v. State*, 11 Ohio, 424; *State v. Poll*, 1 Hawks, 442; *Dunn v. State*, 2 Pike, 229; *Stewart v. State*, 1 Lea, 598.

² *R. v. Mosley*, 1 Moody, 97; 2 Russ. on Crimes, 757; *Kehoe v. Com.* 85 Penn. St. 127. See *infra*, § 286.

³ *R. v. Fagent*, 7 C. & P. 238; *S. P.*, *State v. Center*, 35 Vt. 378.

⁴ *R. v. Bonner*, 6 C. & P. 386; 1 East P. C. 385; *R. v. Dingler*, 2 Leach, 561; *People v. Grunzig*, 1 Parker C. R. 299; *People v. Knickerbocker*, *Ibid.* 302; *People v. Perry*, 8 Abb. N. Y. Pr. (N. S.) 27; *Hill's case*, 2 Grat. 594; *Nelson v. State*, 7 Humph. 542; *Brakefield v. State*, 1 Sneed, 215; *Anthony v. State*, 1 Meigs, 265; *Dunn v. State*, 2 Pike, 229; *Morgan v. People*, 31 Ind. 193; 2 Russ. on Crimes, 761.

⁵ *Kilpatrick v. Com.* 31 Penn. St. 198; *Murphy v. People*, 37 Ill. 447; though see *R. v. Cleary*, cited *infra*, § 284, and discussion thereon.

⁶ *Com. v. Williams*, 2 Ashmead,

lish case, where the evidence was that a boy between ten and eleven years of age was mortally wounded and died next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him, that he was aware that he would be punished hereafter if he said what was not true; and under the circumstances his declarations were held within the rule.¹

§ 283. If the deceased believed he was dying, the admissibility of his declarations is not affected by the fact that his medical attendant had hope. Hence in a case before the twelve English judges on a case reserved,² it was held that the declarations of the deceased, made on the day he was wounded and when he believed he should not recover, were evidence, although he did not die till eleven days after, and although the surgeon did not think his case hopeless, and continued to tell him so till the day of his death.

Not excluded by the fact that physician had hope.

§ 284. Where the party, being confined to his bed, said to his surgeon, "I am afraid, doctor, I shall never recover;" and where the surgeon having said, "You are in great danger," the party replied, "I fear I am;" declarations subsequently made were admitted.³ On the other hand, two days before the death of the deceased, the surgeon told her that she was in a very precarious state, and that, on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she would have got better, but, as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement, which was considered not to be competent evidence as a declaration *in articulo mortis*, as it did not sufficiently appear that, at the making of it,

What expressions indicate belief in impending death.

69. See *R. v. Minton*, 1 M'Nally, 386; *Murphy v. People*, 37 Ill. 447. admission of his declarations. *Lewis v. State*, 9 Sm. & M. 115.

The mere fact that a negro, after receiving his mortal wound, was heard to cry out, "O my people," is not alone sufficient evidence of the expectation of immediate death, to authorize the

¹ *R. v. Perkins*, 9 C. & P. 395.

² *R. v. Mosley*, 1 Mood. C. C. 97; so also *R. v. Peel*, 2 F. & F. 21.

³ *R. v. Craven*, 1 Lew. C. C. 77; *R. v. Simpson*, 1 Lew. C. C. 78.

the deceased was without hope of recovery.¹ So in a case² where the deceased asked his surgeon if the wound was necessarily mortal, and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied;" and after this he made a statement; the statement was held by Abbott, C. J., and Park, J., to be inadmissible as a declaration *in articulo mortis*, as it did not appear that the deceased thought himself at the point of death; for being told that the wound was not necessarily mortal, he might have still had hope of recovery. And where the only evidence that the dying man was aware of his situation consisted in his saying "he should never recover," it was held insufficient.³

The following writing made by the deceased before his death was offered in a prosecution for homicide by poisoning: "Darling: The Doctor — I mean Dr. Medlicott — gave me a quinine powder Wednesday night, April 26. The effects are these: I have a terrible sensation of a rush of blood to the head, and my skin burns and itches. I am becoming numb and blind. I can hardly hold my pencil, and I cannot keep my mind steady. Perspiration stands out all over my body and I feel terribly. The clock has just struck eleven, and I took the medicine about 10.30 P. M. I write this so that if I never see you again you may have my body examined and see what the matter is. Good-by, and ever remember my last thoughts were of you. I cannot see to write more. God bless you, and may we meet in heaven.

"Your loving Hubbie,

"I. M. RUTH."

This was ruled out, as insufficient on its face; there being no extrinsic evidence as to the condition of the defendant's mind.⁴

It has been held in England that a dying declaration cannot be admitted by the judge merely from his own notion of the nature of the wound described, without any evidence that the deceased at that time believed himself about to die, unless such knowledge is necessarily to be imputed to him, and this rule was applied in a case where the deceased received a ball in the chest,

¹ R. v. Megson, 9 C. & P. 418.

See also People v. Robinson, 2 Parker

² R. v. Christie, Car. Cr. L. 232, O. C. R. 235.
B. 1821.

⁴ State v. Medlicott, 9 Kans. 257.

³ R. v. Van Butchell, 3 C. & P. 631.

and having made a declaration charging the defendant, died in a few moments.¹

A statement concluded with these words: "I have made this statement believing I shall not recover;" at the time it was made the deceased was in such a state that his death seemed imminent; and he died seven days afterwards. But it appeared, also, that shortly before he made the declaration he had said to a constable, who asked him how he was, "I have seen Mr. Booker, the surgeon, to-day, and he has given me some little hope that I am better; but I do not myself think I shall ultimately re-

¹ *R. v. Cleary*, 2 F. & F. 850. This case is much discussed in the controversy between Mr. Pitt Taylor and Chief Justice Cockburn, in the *Beddingfield* case. The reporter, in the syllabus, introduced qualifications which, the chief justice stated, were not part of the case as decided. To the chief justice's criticism the following reply from Mr. Finlason appeared in the *Law Times* for Feb. 21, 1880:—

"As the Lord Chief Justice in his pamphlet on dying declarations impugns the head-note to my report of *The Queen v. Cleary*, 2 F. & F., I wish to be allowed to explain it. The wound there was one by a bullet through the body, — a kind of wound not necessarily mortal, — and in point of fact Chief Justice Erle had elicited from a witness that, from what the wounded man said, he did not appear to think that he was dying, and had then rejected the declaration. The counsel for the prosecution then urged that the nature of the wound might be such as to show that the party must have known that he was dying. This, which had been solemnly laid down by the twelve judges in the case of *Reg. v. Johnson*, cited in *East's Pleas of the Crown*, Chief Justice Erle did not dispute, but said, 'How can I, from the fact that he was shot through the body, presume that he must have

believed himself dying?' This I understood to mean that, though the general doctrine was not disputed, the nature of the wound might be such as to show that the party must have believed that he was dying, the wound must appear to have been such as to show beyond a doubt that he must have so believed, and this, with all respect to the Lord Chief Justice, I submit is the true effect of the ruling, and conveys the true doctrine on the subject. That it is so I may cite the authority of the Lord Chief Justice himself to show. For, at the Spring Assizes at Maidstone, 1875 (Crown Court, March 12), the Lord Chief Justice, being consulted by Justice Denman in the case of *Reg. v. Morgan*, just like that of *Beddingfield*, agreed with him in thinking that a declaration made in such a case (*i. e.* a case of the party's throat being completely severed, and death ensuing in a few minutes), the declaration could not be rejected; only, on account of the supposed ruling of Chief Justice Erle in *Cleary's* case (which was cited erroneously, not from the report, but from an incorrect statement of it in a text-book), they would think it right to reserve the point, in consequence of which the prosecution did not press it." On this point see *supra*, § 282.

cover.” Afterwards, on the same occasion, he said he could not recover. It was held that there was sufficient evidence that the statement was made under a consciousness of impending death to justify its reception in evidence.¹

“I am dead; Mr. F. has killed me,” uttered a few hours before dissolution, renders a declaration admissible.²

§ 285. In New York it has been laid down in a Circuit Court that dying declarations should not be excluded in all cases where there is a faint and lingering hope of recovery.³ But such a relaxation of the rule is perilous; and though we have no right to rule out such evidence because we conjecture that the deceased may have at certain moments nourished a transient hope, yet, so far as the construction of the deceased’s own utterances is concerned, it is best to take the rule without qualification, and to hold that the expression of a hope excludes.⁴ Thus in an English case a magistrate’s clerk administered an oath to a dying person, and she made a statement. He asked her if she felt she was likely to die? She said, “I think so.” He said, “Why?” She replied: “From the shortness of my breath.” He said, “Is it with the fear of death before you that you make these statements?” and added, “Have you any present hope of your recovery?” She said, “None.” He then proceeded to write out the deposition, and when finished read it to her, and asked her to correct any mistake that he might have made. She said, “No hope, at present, of my recovery,” and he

¹ R. v. Reany, 40 Eng. L. & Eq. 552; Dears. & B. 151; 7 Cox C. C. 209.

“In R. v. Pickersgill, Leeds Summer Assizes, 1869, the deceased, who was suffering from the effects of poison and died the same night, said: ‘I am getting worse. I am going to die.’ The doctor asked her if she thought she should get better, and she said, ‘No, I shall die.’ Cleasby, B., after consulting Brett, J., said the evidence satisfied them that the woman was in a dying state, and that she believed it. When she said she was going to die, she meant that death was imminent.’ Where the deceased

had received a knife-stab in the neck, and the bleeding, having been stopped, had recommenced, so that his life was in danger, though not in immediate danger, and a magistrate was sent for, the deceased said, ‘Be quick, or I shall die,’ just before making the declaration. Brett, J., after consulting Lush, J., admitted the deposition. R. v. Bernadotti, 11 Cox C. C. 316.” Roscoe’s Cr. Ev. 35.

² State v. Freeman, 1 Speers, 57.

³ People v. Anderson, 2 Wheel. C. C. 398.

⁴ Jackson v. Com. 19 Grat. 656; State v. Moody, 2 Hayw. 81.

then inserted those words. It was held that the declaration was inadmissible, as the words "at present," introduced by the deceased, were a qualification of her previous statement that she had no hope of recovery.¹

§ 286. As has been seen, the fact that the declarations were not made immediately previous to death does not exclude them, provided the deceased was conscious at the time he was in a dying situation.²

Declarations need not have been made immediately before death.

§ 287. Prior declarations, though in themselves inadmissible, may become admissible on subsequent affirmation, in cases where, although the declarant did not, at the time of first making them, believe he was about to die, he subsequently referred to them and affirmed their truth at a time when he knew he was dying.³ And the affirmation may be by signs of assent. Hence a prior written statement, made while there was still hope of recovery, is competent as a dying declaration, if reaffirmed when the person believes himself to be *in extremis*, the statement being shown him, but not read by or to him at that time.⁴

Subsequent affirmation when dying may validate prior statement.

§ 288. The declarations are only admissible where the death of the deceased is the subject of the trial, and the circumstances of the death are the subject of the declaration.⁵ Thus, in a case where the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with attempt to procure abortion; evidence of the dying declarations of the woman was re-

Only admissible when death is the subject of the charge.

¹ R. v. Jenkins, 11 Cox C. C. 250.

² R. v. Mosley, 1 Mood. C. C. 97; R. v. Megson, 9 C. & P. 418; R. v. Reany, *ut supra*; Com. v. Cooper, 5 Allen, 495; Com. v. Roberts, 108 Mass. 301; Com. v. Haney, Sup. Ct. Mass. 1879; State v. Poll, 1 Hawks, 442; State v. Oliver, 2 Houst. 585; Swisher v. Com. 26 Grat. 963; McDaniel v. State, 8 Sm. & M. 401; State v. Daniel, 31 La. An. 91.

³ R. v. Steel, 12 Cox C. C. 168; Young v. Com. 6 Bush, 312.

⁴ Mockabee v. Com. Sup. Ct. Ky. 1880; 9 Rep. 441.

⁵ 2 Russ. on Crimes, 761; Hackett v. People, 54 Barb. 370; State v. Shelton, 2 Jones (N. C.), 360; Hudson v. State, 3 Cold. 355; Crookham v. State, 5 W. Va. 510; State v. Bohan, 15 Kans. 407; Wright v. State, 41 Tex. 246; Johnson v. State, 50 Ala. 456; Leiber v. Com. 9 Bush, 11. This principle is recognized in Stobart v. Dryden, 1 M. & W. 615, 626. As also establishing this point may be consulted R. v. Jenkins, L. R. 1 C. C. 192 — Kelly, C. B.; Anderson, in re, 20 Up. Can. Q. B. — McLean, J.; and R. v. Peltier, 4 Low. Can. 3.

jected, the judge observing that, although the declarations might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry.¹ The same rule applies to trials for producing abortion by the use of an instrument.² We may conclude, therefore, that such declarations are limited to criminal prosecutions when the subject matter of the investigation is the declarant's death;³ and there is sound reason in this, for if the declarations of dying parties are introduced in all cases of physical injury, it would be difficult to exclude them from any other trial in which they should be offered.

§ 289. On the trial of an indictment for the murder of a wife by her husband, the declarations of the deceased, made *in extremis*, as to the cause of her death, are competent evidence against the prisoner,⁴ and so are the dying declarations of a husband against his wife.⁵

§ 290. The dying party, to make the declarations evidence, must have been competent as a witness; therefore, the declarations of a dying child, of only four years of age, have been held inadmissible.⁶ But if the child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences in a future state of telling a falsehood, his declarations, made under a sense of impending dissolution, are admissible.⁷ Thus, the dying declarations of an intelligent child ten years old have been admitted.⁸

¹ R. v. Hutchinson, 2 B. & C. 608, n. See also R. v. Hind, 8 Cox C. C. 300; R. v. Newton, 1 F. & F. 641; R. v. Mead, 2 B. & C. 605; 4 D. & R. 120; R. v. Lloyd, 4 C. & P. 233; R. v. Baker, 2 M. & Rob. 53; Aveson v. Lord Kinnauld, 6 East, 195; Sutton v. Ridgway, 4 B. & Al. 54; Stobart v. Dryden, 1 M. & W. 615, 626; Wilson v. Boerem, 15 Johns. 286; State v. Harper, 35 Oh. St. ; Wooten v. Wilkins, 39 Ga. 223. Compare Mr. Best's remarks in his Treatise on Evidence, 6th ed. (1870) p. 637.

² R. v. Hind, 8 Cox C. C. 300;

People v. Davis, 56 N. Y. 95; State v. Harper, 35 Oh. St.

³ Hackett v. People, 54 Barb. 370; Hudson v. State, 3 Cold. 355; State v. Fitzhugh, 2 Oreg. 227. See *contra*, State v. Wilson, 23 La. An. 558; and *supra*, § 280.

⁴ People v. Green, 1 Denio, 614; Penns. v. Stoops, Addison, 381. .

⁵ Moore v. State, 12 Ala. 764.

⁶ R. v. Pike, 3 C. & P. 598; 2 Russ. on Crimes, 765. *Infra*, § 366.

⁷ 2 Russ. on Crimes, 765.

⁸ R. v. Perkins, 2 Mood. C. C. 135; S. C., 9 C. & P. 395.

§ 291. That the deceased was a disbeliever in a future state of rewards and punishments may, in the lowest view, be used to discredit his testimony,¹ though it does not ^{Infidels.} exclude in jurisdictions where the deceased, if a witness, would have been admissible.²

§ 292. The dying declarations of persons disqualified by conviction of an infamous offence are at common law inadmissible.³ ^{Infamous persons.}

§ 293. It is not essential to admissibility that the statement should be formally expressed in words. T. being at the point of death, and conscious of her condition, but ^{Signs may express assent.} unable to speak articulately in consequence of wounds inflicted upon her head, was asked whether it was C. who inflicted the wounds; and if so, she was requested to squeeze the hand of the person making the inquiry. It was held, that under all the circumstances of the case there was proper evidence against C. for the consideration of the jury; they being the judges of its credibility, and of the effect to be given to it.⁴ *A fortiori* does this hold when the signs thus made go to affirm a prior formal statement.⁵

¹ Goodall v. State, 1 Oreg. 333. *Infra*, § 366. That such evidence is competent on the issue of credibility see State v. Elliott, 45 Iowa, 486.

² State v. Elliott, 45 Iowa, 486; People v. Sanford, 43 Cal. 29; People v. Chin, 51 Cal. 597; but see *supra*, § 276, as to degree of credibility to be given to such evidence.

³ Drummond's case, 1 Leach, 337; 1 Russ. on Cr. 763.

⁴ Com. v. Casey, 11 Cush. 417.

⁵ *Supra*, § 287. Mockabee v. Com. Sup. Ct. Ky. 1880.

"The evidence," said Hines, J., giving the opinion of the court, "shows that he (the deceased) was entirely conscious at the time of this last interview, and although the written statement was not re-read to him at that time, there is nothing to indicate that he did not fully understand its import, and did not fully reaffirm the

statements contained in it. It being perfectly manifest that the mind of the deceased was clear at the time of this last conversation, and that he understood the contents of the paper containing a statement of the circumstances of the wounding, there appears no reason for excluding this evidence simply because the paper was not re-read to him at the time the assent to its correctness was given. The only purpose to be accomplished by re-reading the paper to the deceased would have been to refresh his memory, or rather to make it sure that the deceased, at this solemn moment, in the very presence of death and with an understanding mind, bore testimony to the truth of the statements made without the sanction of the knowledge of impending dissolution. The restatement or reaffirmation gives the sanction without which the declara-

A statement written by an attorney, during the night on which the deceased died, was held not admissible as the dying declarations of the deceased, when it appeared that the attorney propounded questions to him, which he tried to answer, but was unable to do so; that his attendant friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head;" that the statement, consisting of the answers thus made, was, when finished, "read over to him by the attorney, slowly and distinctly, and he signified his assent thereto by nodding his head;" that he spoke but a few words afterwards, and had frequently to be aroused; and that he seemed, while the statement was being read to him, to be in a stupor.¹

To throw light, as we have seen, on the deceased's mental state, his declarations on collateral matters are admissible.²

§ 294. Nothing can be evidence in a declaration *in articulo mortis*, that would not be so if the party were sworn.³ On this rule, anything the murdered person, *in articulo mortis*, says as to the facts is receivable, but not what he says as matter of opinion or belief.⁴ Hence the declaration, "It was E. W. who shot me, though I did not see him," is inadmissible.⁵ But where, in making a dying declaration, the declarant, in speaking of the fatal wound, said it was done without any provoca-

tions would not be admissible, and when that sanction is added, the evidence is as competent as it would be if made then for the first time. Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, — as the pressure of the hand, a nod of the head, or a glance of the eye. In this instance, the evidence of those who were present at the bedside of the dying man, as well as the manner in which he bore himself, show conclusively that his mind was clear and that he remembered what he had previously stated."

¹ *McHugh v. State*, 31 Ala. 317. See also *Barnett v. People*, 54 Ill. 325.

² *Donelly v. State*, 2 Dutch. 496.

³ See *People v. Olmstead*, 30 Mich. 431.

⁴ *R. v. Sellers*, O. B. 1796, Car. Cr. L. 233; *Shaw v. People*, 3 Hun, 272; *People v. Shaw*, 63 N. Y. 36; *Binns v. State*, 46 Ind. 311; *McPherson v. State*, 22 Ga. 478; *Whitley v. State*, 38 Ga. 50; *Johnson v. State*, 17 Ala. 618; *Ben v. State*, 37 Ala. 103; *Collins v. Com.* 12 Bush, 271. That a statement as to the identity of the aggressor is admissible see *Brotherton v. People*, 75 N. Y. 159.

⁵ *State v. Williams*, 68 N. C. 62.

tion on his part, it was held in Ohio that this declaration was not incompetent, it relating to fact, not opinion.¹ And a statement by a dying woman, that "he" (the defendant) "operated on me," is admissible against the party charged with killing her when attempting to produce an abortion.²

§ 295. If the declaration of the deceased, at the time of his making it, be reduced into writing, the written document must be given in evidence, and no parol testimony respecting its contents can be admitted.³ And it has been held in England, that if a declaration *in articulo mortis* be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of a declaration which is not itself produced when its production is possible.⁴ But where the dying person repeated his declaration three several times in the course of the same day, the fact of its having been committed to writing in the presence of a magistrate, on the second occasion, will not, it seems, exclude parol evidence of the others, where it is not in the power of the prosecutor, at the trial, to give that which has been committed to writing in evidence.⁵ And on one occasion in Ireland, in a case where the depositions of the individual, made at the time when he thought himself dying, were taken down by the magistrate, and not in the presence of the prisoner, it being objected at the trial that the depositions were not pursuant to the statute,⁶ the magistrate was sworn, and gave parol evidence of the declarations of the deceased.⁷ In this country, in cases where no statute exists to

Practice when declarations have been reduced to writing.

¹ *Wroe v. State*, 20 Oh. St. 460. See 1 Greenl. on Ev. § 99.

When upon the trial of a prisoner for the murder of his wife, a witness for the People, who had heard cries proceeding from the house of the prisoner in the night preceding her death, was permitted, in the court below, to testify what these cries indicated, whether the person was crying from joy or grief; this was reversed in the Supreme Court of New York, on the ground that the question called for the conjecture of the witness as to the cause of the cries, and not for a de-

scription of them. *Peckham and Allen, JJ.*, diss. *Messner v. People*, 45 N. Y. 1. See comments, *supra*, § 271.

² *Maine v. People*, 16 N. Y. Sup. Ct. 113.

³ *Vin. Ab. Evid.* 38 A. b; though see *Beets v. State*, 1 Meigs, 106; *Kelly v. State*, 52 Ala. 36.

⁴ *R. v. Gay*, 7 C. & P. 230; *S. P. Binns v. State*, 46 Ind. 311.

⁵ *R. v. Reason*, 1 Str. 500.

⁶ 10 Car. c. 1, Irish.

⁷ *R. v. Callaghan*, 1 M'Nally, 385; *R. v. Woodcock*, 2 Leach, 563.

authorize the taking of such a deposition, it has been said that a written statement so taken is inadmissible, though it may be received as secondary evidence, or to refresh the memory of the magistrate.¹ On the other hand, a deposition was received upon evidence that on being read to the deceased he said it was "as nigh right as he could recollect the circumstances."² Of course, when the deposition is put in evidence, the *whole* is to be read.³ When lost, parol evidence of its contents can be given.⁴ It is not necessary that the written statement, when it is put in evidence, should show upon its face that it was made under the apprehension of impending death. This is a fact *dehors* the writing, and may be proved by parol evidence.⁵

§ 296. Where the declarations of the injured party are part of the *res gestae*, they are admissible without proof of a consciousness of approaching death;⁶ but such is not the case when they relate to anything beyond the *corpus delicti*. Thus in death by wounding, they have been confined to statements necessary to give informa-

Admissible without these limitations when part of the *res gestae*.

¹ *Beets v. State*, 1 Meigs, 106. So in *State v. Fraunburg*, 40 Iowa, 555, where the writing was rejected, not having been read to deceased, but was received to refresh witness's memory.

² *State v. Ferguson*, 2 Hill (S. C.), 619. See *Mockabee v. Com.* supra, § 293.

³ *State v. Martin*, 30 Wis. 216.

⁴ *State v. Patterson*, 45 Vt. 308.

⁵ *R. v. Hunt*, 2 Cox C. C. 236; *Com. v. Haney*, Sup. Ct. Mass. 1879.

⁶ *Supra*, § 263; *State v. Wagner*, 61 Me. 178; *Com. v. M'Pike*, 3 Cush. 181; *Com. v. Hackett*, 2 Allen, 136; *State v. Porter*, 34 Iowa, 131; *Jackson v. State*, 52 Ala. 305. See *R. v. Edwards*, 12 Cox C. C. 230. *Supra*, § 281.

As to what is included in the *res gestae*, an animated discussion arose in England in 1879, in *R. v. Bedingfield*, a homicide case tried before Lord Chief Justice Cockburn. See supra, § 254. After consulting Field, J., and Manisty, J., he rejected certain

declarations of the deceased, on the ground that they were not part of the *res gestae*, and he also ruled that there was not sufficient ground to hold that they were admissible as dying declarations. A letter criticising this ruling was published by Mr. Pitt Taylor, and this letter was answered by the chief justice in a pamphlet, to which Mr. Taylor published a formal reply. See *Law Times*, Dec. 27, 1879.

The statement in the *Law Times* Nov. 22, 1879, p. 58, is that "the prisoner, a stone-mason, and a married man, lived in the Woodbridge-road, Ipswich, and the deceased, a widow, was a laundress, living about half a mile off in the same road. The prisoner had been a friend of the husband, and had, during his illness, looked after his affairs for him, and after his death continued to look after the horse which the deceased used in her business, being allowed in return the use of it when not required by her, and permission to keep pigs at her place. It appeared that he wished her to let him

tion on the subject of the wound,¹ and in death by poisoning, to

have her horse and cart, which she however declined to do. He used to come twice a day to the house, and they called each other 'Harry' and 'Eliza.' A witness spoke to several quarrels having taken place between prisoner and the deceased before the fatal day, which they afterwards made up, and stated that on one occasion there was a quarrel on account of the prisoner's wanting the horse and cart and deceased refusing to let him have it, and that on the day previous to the murder, the 7th July, the deceased had sent away the pigs' food from her house. On the morning of the murder prisoner came in at half-past seven, the deceased being then at work washing, and her assistant, Mrs. Rodwell, being also there. The deceased went into the front room, prisoner followed her, and the door was shut. About ten minutes afterwards he came out of the room into the back room, where he went to the cupboard and took out a small bottle, with which he went out, and, as appeared, got some rum in it. Mrs. Rodwell went into the front room, and found deceased in a faint on the floor with her head on a hassock, as if it had been put by some one under her head. Deceased spoke and said, 'O dear, how bad I feel!' Mrs. Rodwell then went back to her work, and in about three or four minutes she was in the drying ground, where another assistant was, who said something to her, in consequence of which she went back to the house. On her way back she saw deceased coming out of the gate bleeding very much from the throat, and seeming very much frightened. Deceased said something to the witness, which, however, was ex-

cluded, and so was not stated, though its effect may be surmised from what the lord chief justice said, that 'if admitted, it might have a fatal effect.' The prosecution tendered it in evidence, but the lord chief justice, in holding it not admissible, said, 'Anything that was uttered at the time — that is, that the woman uttered an exclamation, or pointed in a certain direction while the act was being done, or that she screamed — would be admissible as part of the *res gestae*, but this was something said after all was over, and as it was said in the absence of the prisoner, was not admissible.' He also observed 'that he regretted that by the law of England any statement made should not be admissible.' The case accordingly went to the jury with this statement excluded, but nevertheless they found the prisoner guilty."

It has been objected to this ruling, so states the Law Times, that the declaration was admissible (1.) as a dying declaration, and (2.) as part of the *res gestae*. That it could not have been admitted as a dying declaration was insisted on on the ground there was no proof of the declarant's consciousness that she was dying. See *R. v. Cleary*, discussed supra, § 284.

That it was admissible as part of the *res gestae* is argued in the Law Times on the following grounds:—

"The principal cases which have been put forward to show its applicability to the present case are *R. v. Foster*, 6 C. & P. 325, and *Thomson et ux v. Trevanion*, Skin. 402. In the former case, which was tried before three judges in 1834, the prisoner was charged with manslaughter in killing A., by driving a cabriolet over him.

¹ *Denton v. State*, 1 Swan, 279. See *Donnelly v. State*, 2 Dutch. (N. J.) 463, 601, 670.

details of the deceased's health.¹ And the *res gestae* are not to

B. saw the cabriolet drive by, but did not see the accident, and immediately afterwards on hearing A. groan went up to him, when A. made a statement as to how the accident happened. It was held that this statement was receivable in evidence on the trial of the prisoner for the manslaughter of A. In the latter case, which was an action by husband and wife for wounding the wife, Lord Chief Justice Holt allowed what the wife said immediately after the hurt received.

“We have not seen any English murder case cited in support where a similar statement has been held admissible, and we are not aware of there being any. An Irish case is that of *R. v. Hugh Lunny*, 6 Cox C. C. 477, tried in 1852 before Monahan, C. J., on the Irish Home Circuit. The deceased had died from the effects of a wound on his head inflicted by a stick. A girl in the neighborhood had heard a cry, and coming out had found the deceased standing with his cap in his hand and apparently weak and injured. The deceased did not survive more than a few hours. It was objected on prisoner's behalf that it could only be as a dying declaration that what the prisoner (*sic*) said to the witness could be evidence, and they had not shown that at this time the deceased knew he was dying. His lordship ruled that what the deceased then said was evidence as part of the *res gestae*, and upon the question being put, the witness said: ‘I asked him what was the matter with him. He said he was robbed by the man who walked with him from the cross roads.’ The prisoner was convicted of murder. It would be difficult to find a more parallel case to the one under

discussion than that we have just cited, and the conclusion to be derived from the two is that if Monahan, C. J., was right in the one case, the lord chief justice is wrong in this, and *vice versa*. An American case of a similar kind is that of *Com. v. McPike*, 3 Cush. 181.” See *supra*, § 284. “There it was held that the declaration of a person who is wounded and bleeding that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up-stairs into another room, is admissible in evidence after her death as a part of the *res gestae*. This case furnishes an *a fortiori* argument against the ruling of the lord chief justice. On the other hand, it must not be forgotten that it is extremely difficult to lay down particularly any rules for determining whether such statements come within the *res gestae*. Apart from the Irish case, which was only a circuit case, the English cases where such statements have been admitted were not cases involving the punishment of death. If they had been it is probable that the judges would have discussed the admissibility of the statements at much greater length than the reports represent them to have done. Further, it must be remembered that the rule is an exception to the general rule as to hearsay, and it is not always advisable to extend such exceptions too far. Mr. Greaves mentions a striking instance of the danger of trusting to statements made after a mortal wound has been inflicted, as having been tried at Gloucester Summer Assizes, 1842. The prisoner, one Macarthy, was indicted for murder, and the deceased

¹ *R. v. Johnson*, 2 C. & K. 354.

be construed as extending beyond the immediate emanations of the litigated act.¹

had been stabbed by the prisoner, whilst he was pursuing him in order to give him into custody for an assault, and the deceased expressly stated that the prisoner had knocked him down, but two companions of the deceased, who were present during the whole time, distinctly proved that the deceased was not knocked down at all. This is of course no argument against the rule as to admitting statements forming part of the *res gestae*, but it is one to cause judges to exercise with caution the discretion they are allowed to exercise in admitting such statements upon trial for murder."

Chief Justice Cockburn's definition of *res gestae* is given, supra, § 263.

In *Field v. State*, Sup. Ct. Ind. 1880 (10 Cent. L. J. 335), the defendant was convicted of the murder of his wife by poisoning. The evidence showed that the wife being discovered about eight A. M. in her room vomiting, her husband, who was at work in the field, was sent for, and shortly afterwards the manager of the plantation was sent to for medicine and assistance. He came with medicine, which he administered to the sick woman. In response to his inquiries as to her feelings and symptoms, she said that she felt as if she was on fire inside, and being asked what she had eaten, replied, "Nothing but some bread and coffee at breakfast." She died the next day. It was held, that the answer of the woman as to her symptoms was admissible, but the admission of what she said as to the bread and coffee was error. The groans, exclamations, or statements of a sick or injured person, expressive or explanatory of his then present feelings or symptoms, whether made

to a physician or other person, are receivable in evidence, it was argued by Chalmers, J., giving the opinion of the court, because they are regarded as illustrative of the symptoms; and where the symptoms constitute the fact to be determined, the symptoms and explanations, uttered while they are being suffered, are properly treated as part of the *res gestae*. But if the statements are in narrative form, relate to the past rather than to the present, and detail the causes which have produced the symptoms, rather than the symptoms themselves, they are inadmissible, whether made to a physician or other person. The exceptions to the rule that declarations of one party, in order to be admissible against another, must be simultaneous or contemporaneous with the principal event, seem to rest upon the idea that the interval of time has been very brief; that they are made to the person first proffering assistance or making inquiry, and that there has been neither opportunity nor motive for fabricating a false story. The case at bar, it was held, "does not come up to these requirements. The time which elapsed between the drinking of the coffee by the deceased and the statement with regard to it is not fixed; but we gather from the record that about one hour, probably, had intervened. Several persons had reached her and undertaken to relieve her before the manager of the plantation was sent for, and it is reasonable to suppose that surmises and suggestions had been made by them with reference to the nature and cause of the malady."

¹ *Jackson v. State*, 52 Ala. 305. Supra, §§ 262, 271.

In *Crookham v. State*, 5 W. Va.

§ 297. The court is to decide as to the admissibility of the declarations.¹ Consequently, the truth of the facts put in evidence, to show that declarations were made in view of speedy death, is matter for the court; and its decision on the facts it finds proven is matter of law, and may be reviewed.² And it has been ruled that where the prosecution offers evidence of the dying declarations of the deceased, and the defendant objects to their admissibility and moves to exclude them, if the court refuses to decide on the motion until all the evidence in the case is closed, and compels the defendant to proceed with his defence, and then, after the evidence in the case is closed, decides the defendant's motion and erroneously admits a part of the dying declarations objected to, and the defendant is convicted, the judgment will be reversed.³

§ 298. The same principles of law are applicable to the contradictory statements of persons *in extremis*, as are to those of a witness under examination on oath.⁴ Where

510, the proof was that at the time of the attack the party assailed called for help, and to the inquiry what was the matter, he answered, "that somebody was killing him, and was cutting him with a knife," and that it was the prisoner, naming him; and that the prisoner naming him, "has stabbed me; he has killed me; for God's sake send for the doctor." It was held not error in the court below to refuse to exclude the words which included the prisoner's name, as the declarations of the deceased were a part of the *res gestae* and admissible. But where a witness was asked, "after the deceased declared he was dying, and while he was dying, did he make any declaration as to how he received the wounds, and by whom they were inflicted; if so, what were those declarations;" and the answer was, "None, except he said that it was hard to die by the hand of another and leave his family;" it was held error to admit such declaration in evidence as part of the *res gestae* because too remote from the transaction.

¹ 1 Greenl. on Evid. § 160; 1 Leach, 504; R. v. Hucks, 1 Stark. 522; R. v. Van Butchell, 3 C. & P. 629; R. v. Reany, 40 Eng. L. & Eq. 552; Dears. & B. 151; 7 Cox C. C. 209; R. v. Jenkins, L. R. 1 C. C. 187; Donnelly v. State, 2 Dutch. 601; Com. v. Murray, 2 Ashm. 41; Starkey v. People, 17 Ill. 17; State v. Elliott, 45 Iowa, 486; Hill's case, 2 Grat. 594; State v. Poll, 1 Hawks, 442; State v. Williams, 68 N. C. 62; Faire v. State, 58 Ala. 74; M'Daniel v. State, 8 Sm. & M. 401; Lambeth v. State, 23 Miss. 322; Dixon v. State, 13 Fla. 636; People v. Glenn, 10 Cal. 32; *contra*, Campbell v. State, 11 Ga. 354; Jackson v. State, 56 Ga. 237.

² Donnelly v. State, 2 Dutch. 463 601.

³ Johnson v. State, 47 Ala. 9.

⁴ R. v. Sellers, *supra*, § 294; People v. Knapp, 1 Edm. (N. Y.) Sel. Cas. 177; Com. v. Lenox, 3 Brewst. 249; McPherson v. State, 9 Yerg. 279; People v. Lawrence, 21 Cal. 368; Hurd v. People, 25 Mich. 405; People

the court below charged the jury, "if they found that the deceased in her dying declarations made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness," it was held that this charge was erroneous.¹ And if the declarations turn out to be irrelevant, the jury may be directed to disregard them.²

peached by same tests as are applicable to evidence adduced on trial.

In Ohio, however, it has been ruled, though with doubtful propriety, that where dying declarations are proved in a case, a statement of the deceased made at another time, which is neither a dying declaration nor a part of the *res gestae*, is not admissible to impeach such declarations.³ On the other hand, it is held in North Carolina, that dying declarations, when impeached, may be corroborated by prior declarations made after the wound, though it be not shown that such declarations were made under a sense of impending dissolution.⁴

§ 299. If it be shown that the declarations were uttered by the dying man, to be connected with and qualified by other statements, and with them to form an entire complete narrative, and, before the purposed disclosure was fully made, they had been interrupted and the narrative left unfinished; such partial declarations, it is said, would not be competent evidence.⁵ But if it appear that the deceased stated all that he desired to say, the fact that the narrative of what occurred is not complete does not render the declaration incompetent.⁶

Inadmissible if clearly fragmentary.

§ 300. The objection that the questions to which the answers of the dying man were given were leading questions is not properly applicable, if it appear that the deceased spoke intelligently and did not torpidly assent to what was said by his questioner.⁷

No objection that questions were leading, if deceased spoke intelligently.

v. Knapp, 26 Mich. 112. But see *People v. Maine*, 16 N. Y. Sup. Ct. 113.

¹ *McPherson v. State*, *ut supra*.

² *Scott v. People*, 68 Ill. 508.

³ *Wroe v. State*, 20 Oh. St. 460.

⁴ *State v. Blackburn*, 80 N. C. 474.

⁵ *Vass v. Com.* 3 Leigh, 786; *Luby v. Com.* 12 Bush, 1.

⁶ *State v. Patterson*, 45 Vt. 808; *State v. Nettlebush*, 20 Iowa, 257; *Vass v. Com.* 3 Leigh, 786; *People v. Chin*, 51 Cal. 597.

⁷ *Ibid.*; *R. v. Fagent*, 7 C. & P. 238; *R. v. Smith*, L. & C. 607; *Com. v. Casey*, 11 Cush. 417; *People v. Sanchez*, 24 Cal. 17.

Substance
may be
proved.

§ 301. The substance of dying declarations may be admitted in evidence,¹ and this may be done, if need be, through the medium of interpreters.²

Character
of deceased
for truth
may be im-
peached.

§ 302. It has been held that evidence is admissible, on part of the defence, to impeach the character of the deceased for truth, he standing on the same footing as a witness called into court and then examined;³ and in one case, where the dying declarations of the deceased were admitted to show that the defendant, with intent to produce on her an abortion, had administered to her oil of tansy, which was the cause of her death, the defendant was allowed to show that the declarant was considered a woman of loose character and light reputation.⁴ So it may be shown that the declarant was insane,⁵ or was an unbeliever,⁶ or was in the constant habit of making mistakes as to the identity of others.⁷ It has been held, however, that it is not competent for the prisoner to prove that, before the affray, the deceased had expressed a violent hatred to him, and a disposition to do him injury, or that he was very hostile to him.⁸

Jury are to
judge of
credibility
of such
declara-
tions.

§ 303. Where dying declarations are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, if either, is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions, it is error.⁹ The jury are to judge of the credit due to dying declarations, as in the case of any other testimony, by all the circumstances.¹⁰

§ 304. The dying declarations of the deceased may be received

¹ Black v. State, 1 Tex. Ap. 368.

² Hill (N. Y.), 317. But see supra, § 60.

³ Montgomery v. State, 11 Ohio, 424; Starkey v. People, 17 Ill. 17; Ward v. State, 8 Blackf. 101; Nelms v. State, 13 Sm. & M. 500. See supra, § 295.

⁵ Donnelly v. State, 2 Dutch. 469.

⁶ See supra, § 291.

⁷ Com. v. Cooper, 5 Allen, 495.

⁸ Donnelly v. State, 2 Dutch. 496; Nesbit v. State, 43 Ga. 238. To this effect see Roscoe's Cr. Ev. 37; 3 Russ. on Cr. by Greaves, 4th ed. 270.

⁸ State v. Varney, 8 Boston Law R. 542, *sed quaere*. Infra, § 376.

⁴ People v. Knapp, 1 Edm. (N. Y.) Sel. Cas. 177. See Carter v. People,

⁹ Moore v. State, 12 Ala. 764; Starkey v. People, 17 Ill. 17. See supra, § 276.

¹⁰ Com. v. Casey, 11 Cush. 417; Donnelly v. State, 2 Dutch. 483, 601. See supra, § 276.

in favor of the defendant. Upon an indictment for manslaughter, a surgeon stated that the deceased seemed perfectly sensible of the dangerous state in which he was, and said he knew he could not get better, and afterwards said, "I don't think he would have struck me if I had not provoked him." Coleridge, J., at first expressed some doubt whether he ought to receive the statement, but afterwards admitted it, observing that it might have an influence on the amount of punishment.¹ But such declarations must be made under a sense of impending dissolution,² and they must be relevant to the points in issue.³

¹ *R. v. Scaife*, 1 M. & Rob. 551; 2 Lew. C. C. 150. See *U. S. v. Taylor*, 4 Cranch C. C. 338; *Moore v. State*, 12 Ala. 764; *People v. Knapp*, 26 Mich. 112.

² *Com. v. Densmore*, 12 Allen, 535; *People v. McLaughlin*, 44 Cal. 435.

³ *Sayres v. Com.* 88 Penn. St. 291.

CHAPTER VI.

JUDICIAL NOTICE.

§ 308. THE law as to judicial notice being the same in criminal as in civil issues, there are no distinctive features which it is necessary here to notice. The topic in its general relations will be found discussed in my treatise on Evidence in Civil Issues.¹

Rule the same in criminal as in civil issues.

¹ See Whart. on Ev. as follows:—

I. GENERAL RULES.

Court cannot take notice of evidential facts not in evidence, § 276.

Non-evidential facts may be judicially noticed, § 277.

Reason a coördinate factor with evidence, § 278.

Judge may on his own motion interrogate witness and start points of law, § 281.

May consult other than legal literature, § 282.

May of his own motion take notice of law, § 283.

Law of God, natural and revealed, § 284.

Law of nations, § 285.

Domestic law, § 286.

II. CODES AND THEIR PROOF.

Federal laws not “foreign” to the States, nor state laws to the federal courts, § 287.

Particular States foreign to each other, § 288.

State laws may be proved from printed volume, § 289.

Court may determine whether statute has passed, § 290.

Judicial notice taken of laws of prior sovereign, § 291.

Private laws not noticed by court, § 292.

Distinction between public and private laws, § 293.

Court takes notice of mode of authenticating laws; and herein of legislative action generally, § 295.

Subsidiary systems noticed, § 296.

Equity, § 296.

Military law, § 297.

Law merchant and maritime, § 298.

Ecclesiastical law, § 299.

Foreign law must be proved, § 300.

Proof must be by parol, § 302.

Experts admissible for this purpose, § 305.

Experts may verify books and authorities, § 308.

Foreign statutes may be proved by exemplification, § 309.

Printed volumes are *primâ facie* proof, § 310.

Judicial construction of one

State is adopted by another,
§ 311.

Statute must be put in evidence,
§ 312.

Foreign elementary jurisprudence can be noticed, § 313.

Foreign law presumed not to differ from *lex fori*, § 314.

But not so as to local peculiarities, § 315.

Lex fori determines rules of evidence, § 316.

III. EXECUTIVE AND JUDICIAL DOCUMENTS.

Court takes notice of executive documents, § 317.

Public seal of State self-proving, § 318.

So of seals of notaries, § 320.

So of seals of courts, § 321.

So of handwriting of executive,
§ 322.

So of existence of foreign sovereignties, § 323.

So of judicial officers, and practice, § 324.

So of proceedings in particular case, § 325.

So of records of court, § 326.

IV. NOTORIETY.

Notoriety in Roman law, § 327.

Canon law, § 328.

General characteristics of notoriety, § 329.

Of notoriety no proof need be offered, § 330.

Notorious customs need not be proved, § 331.

INSTANCES :

Course of seasons, § 332.

Limitations of human life as to age, § 333.

Limitations of human life as to gestation, § 334.

Conclusions of science and political economy, § 335.

Ordinary psychological and physical laws, § 336.

Leading domestic political appointments, § 337.

Leading public events, § 339.

Leading features of geography,
§ 340.

CHAPTER VII.

INSPECTION.

Inspection is evidence to eye and touch,
§ 311.

Is valuable when an ingredient of circum-
stantial evidence, § 312.

Not to be accepted when better evidence is
to be had, § 313.

Instruments may be tested in court, § 314.

§ 311. THE first mode of inspection to be noticed is that which is incidental to persons or things already before the court. The appearance of a defendant, for instance, so as to make up a basis of comparison in cases of identity, need not be proved by testimony, when the defendant is present in person at the trial. By the Romans this method of proof is frequently noticed.¹ By the glossarists the *evidentia facti* is spoken of as a *species probationis adeo clara, ut nihil magis, nec judex aliud quam illam requirat*.² Under the title “probatio per aspectum,” it is mentioned as one of the most effective modes of conviction.³ Nor is it only the immediate object presented to the eye that is thus proved. Inferences naturally springing from such appearances are to be accepted: age and bodily strength being thus inferred.⁴ Yet the inference is not to be regarded as certain, *nam aspectus facile decipit*.⁵ But a foot-print, when duly proved, is also an *indicium*.⁶ Whether the court, at its own motion, could direct an inspection, or, as we call it, a view, was much discussed, and by the later practice conceded.⁷

¹ See Cic. top. c. 2, § 29; L. 32 de minor. iv. 4; L. 8. Cod. fin. reg. iii. 39; Endemann, 82.

² See Masc. i. qu. 8.

³ Durant. ii. 2, de prob. § 4, nr. 9, who extends proof by inspection to include the logical consequences of inspection — *e. g. ex eo quod clericus*

parvam habet filiam, probatur non diu continuisse. See Endemann, 83.

⁴ Alciat. De praes. ii. 14, nr. 3; Menoch. De praes. ii. 50, nr. 38, 39.

⁵ Bart. Const. i. 92, nr. 3; Menoch. ii. 51, nr. 61; Endemann, 83.

⁶ Masc. i. c. nr. 21.

⁷ See Endemann, 84; Schmid, p.

Inspection, it will be therefore seen, is of three kinds: (1.) That which is incidental to the reception of proof, as when a witness when testifying, is inspected with reference to his credibility, and when a document is inspected after it has been put in evidence for other purposes;¹ (2.) When a party is inspected with reference to capacity (*e. g.* age, strength), this being incidental to his presence in court; and (3.) Where a thing is offered primarily for inspection, which is the sense usually applied to the term in this chapter. It is also to be observed that inspection includes perception by any of the senses: *quae cerni tangive possunt*,² as where a weapon is exhibited to a jury in order that its weight may be felt.

§ 312. The inspection of documents already in evidence for other purposes has been elsewhere discussed.³ From this we turn to the most conspicuous illustration of inspection as a primary mode of proof; that which exists in cases where juries are taken to view the place where the events of the litigation occurred, when such a visit shall be deemed by the court important for an elucidation of the testimony.⁴ So all instruments by which an offence is alleged to have been committed;⁵ all clothes of parties concerned, from which inferences may be drawn; all materials in any way part of the *res gestae*, may be produced at the trial of the case.⁶

Inspection
valuable as
an ingre-
dient of
circum-
stantial
evidence.

309, note 5; Seuffer, Archiv. iv. nr. 88.

¹ For inspection in cases of forgery see *infra*, § 845; in cases of comparison of hands, *infra*, §§ 557 *et seq.*

² Cic. top. c. 2, § 27. As to force of proof by inspection, see *Ingram v. Plasket*, 3 Blackf. 450.

³ See *Ingram v. Plasket*, 3 Blackf. 450. As to inspection of documents by jury see *Howell v. Ins. Co.* 6 Biss. 436. See Whart. on Ev. § 81; *infra*, § 845.

⁴ See Whart. Cr. Pl. & Pr. § 707; *R. v. Martin*, L. R. 1 C. C. 78; *Mossam v. Ivy*, 10 How. St. Tr. 562; *State v. Knapp*, 45 N. H. 148; *Ruloff v. People*, 18 N. Y. 179; *Eastward v. People*, 3 Parker C. R. 25; *Fleming*

v. State, 11 Ind. 234; *Chute v. State*, 19 Minn. 271; *State v. Bertin*, 24 La. An. 46. Under the English statutes, see *Stones v. Menhem*, 2 Exch. 382; *Morley v. Gaz. Co.* 2 F. & F. 373. It is error to permit the jury to go out by themselves, in the defendant's absence, to view a disputed object. *State v. Bertin*, 24 La. An. 46; *Smith v. State*, 42 Tex. 444. See Whart. Cr. Pl. & Pr. § 707.

⁵ *Wynne v. State*, 56 Ga. 113.

⁶ See *infra*, §§ 795 *et seq.* See also *Com. v. Brown*, 121 Mass. 69; *La Beau v. People*, 34 N. Y. 223; *People v. Gonzales*, 35 N. Y. 49; *Gardner v. People*, 6 Parker C. R. 155; *State v. Mordecai*, 68 N. C. 207; *State v. Graham*, 74 N. C. 646.

Injury to the person may also be proved by inspection. Thus in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial, to be inspected by the court and jury, while the surgeon who was employed to set it testifies as to the injury.¹ In a North Carolina case,² the defendant, who was charged with murder, set up as a defence that the

In *State v. Blair*, tried at Newark, N. J., October, 1879, before Depue, J., where the question was whether Blair, the defendant, shot Armstrong, his coachman, in self-defence, we have the following:—

“Albert Honvidtz, of the sheriff’s office (called for the prosecution), testified that he had tried a number of experiments with a pistol on the same kind of stuff as that of which Armstrong’s outer garment was made.

“The witness spread a piece of checked gingham before him and produced a pistol.

“‘I tried the experiments,’ said the witness, ‘with the same kind of a pistol as that of Blair’s in the court-house cellar. At nine different distances—close, and at $\frac{1}{2}$ an inch, 1, 2, 3, 4, 5, 6, and 12 inches.’

“The witness exhibited a cloth with a large ragged hole and a scorch of powder around it, and the others in succession. On each the mark of the powder-burn became less distinct as the distance of the range was increased. On the twelve-inch rag, as it may be termed, the powder burn was scarcely perceptible.

“The purpose of this testimony was quickly appreciated by the defence. It was offered in anticipation of Blair’s statement that he was engaged in a struggle with Armstrong at the time of the shooting, and wrested the rusty pistol from the coachman’s grasp.”

For the defence, Mr. Marsh, a lawyer in court, was called, and at the request of the counsel for the defence

“personated Armstrong reaching forward for the pistol, one foot forward, and his back half turned to Mr. Blair. Judge Titsworth held the lawyer by the left shoulder as Blair is supposed to have held Armstrong, and, with a pistol pressed against the lawyer’s body, showed how Blair had shot him then in the back or the side.” N. Y. Evening Post, Oct. 9, 1879. See *Brown v. Foster*, 113 Mass. 136.

Even an article proved to be of the same pattern as one the subject of litigation can be produced before the jury, to illustrate the nature of an injury by or to such article. *American Express Co. v. Spellman*, 90 Ill. 455.

In *State v. McCafferty*, 64 Me. 223, the jury were permitted to take with them a bottle of ale which was part of the same manufacture as that which was the subject of the trial.

But experiments by a jury, on articles not committed to them, and in the absence of the parties, vitiate the verdict. *State v. Sanders*, 68 Mo. 202.

Magnifying glasses may be used in the inspection of documents; *Hatch v. State*, 6 Tex. Ap. 84; and of jewelry. *Shoot v. State*, 63 Ind. 376.

¹ *Mulhado v. R. R.* 30 N. Y. 370. In *Wiener v. State*, 66 Mo. 13, the bones of the deceased were exhibited in court for the purpose of illustrating his position at the encounter. As to inspection of remains in alcohol see *State v. Vincent*, 24 Iowa, 570. *Infra*, § 326.

² *State v. Garrett*, 71 N. C. 85.

deceased was accidentally burned to death, and that she (the defendant) burned her hands in trying to extinguish the fire. She was ordered by the coroner to show her hands, which exhibited no trace of burning. Evidence of this was received on trial.¹ When the issue is infancy, on an indictment, the court and jury may decide by inspection,² and so when the question arises as to the color of a person.³ On an issue of bastardy, the jury may judge of likenesses by inspection;⁴ and so on an issue of adultery, for the purpose of connecting a child with a putative father.⁵ It is inadmissible, however, to resort, on such issues, to the inspection of pictures.⁶ On an issue of pregnancy, a jury of matrons is empanelled to decide the issue by inspection.⁷

But while identity is frequently an inference from inspection, it has been ruled that a defendant not under oath is not entitled to repeat something in the presence of the jury, to rebut evidence of a witness for the government who testified that he identified the defendant by his voice.⁸

Animals, also, may be brought into court for inspection, when their size or other qualities are at issue.⁹

¹ See, however, *Stokes v. People*, cited *infra*, § 313.

² *State v. Arnold*, 13 Ired. 184. See, however, *Ihinger v. State*, 53 Ind. 251, in which it was held error, on an indictment for selling liquor to a minor, to permit the jury to determine age by inspection.

³ *Warlick v. White*, 76 N. C. 89; *Garvin v. State*, 52 Miss. 207.

⁴ *State v. Woodruff*, 67 N. C. 89. See *State v. Britt*, 78 N. C. 439.

⁵ *Stumm v. Hummel*, 39 Iowa, 478; but not on an issue of seduction as part of proof against the alleged seducer. *State v. Danforth*, 48 Iowa, 43; citing *Kensington v. Rowe*, 16 Me. 38; *Rink v. State*, 19 Ind. 152.

⁶ *Beers v. Jackman*, 103 Mass. 192.

⁷ *Baynton's case*, 14 How. St. Tr. 630; *R. v. Wycherly*, 8 C. & P. 262.

⁸ *Com. v. Scott*, 123 Mass. 222.

⁹ *Line v. Tayler*, 3 F. & F. 731;

Wood v. Peel, cited *Taylor's Ev.* § 500; *Lewis v. Hartley*, 7 C. & P. 405. In an English case passing through the English daily papers in the spring of 1876, it is stated that "Mrs. Priscilla Wolfe, a widow lady of independent means, residing at Kilsby, near Rugby, sued Richard Jones, butcher, of the same place, for £5 damages, for illegally killing a cockatoo parrot belonging to the plaintiff. The defence was that the defendant shot the cockatoo mistaking it for an owl. The fellow-bird of the deceased cockatoo was brought into court, and afforded great amusement by strongly recommending the parties to 'Shake hands,' 'Shut up,' and asking for 'sugar.'"

In *Thurman v. Bertram*, before the Exchequer Division, on July 21, 1879, a "baby elephant" was produced in evidence. The report in the *London Mail*, reprinted in 20 Alb. L. J. 151,

§ 313. When, however, more exact proof can be produced, inspection does not afford a sufficient basis on which to rest a judgment. Thus in Indiana, where, under a statute, it was necessary to prove that the defendant was fourteen years old, it was held that in a case open to doubt this proof must be, if possible, supplied by witnesses or records, and cannot be determined by inspection alone.¹

§ 314. As we have seen, it is one of the necessary incidents of bringing into court instruments by which an act is alleged to have been done, that such instruments

says: "The baby elephant walked into court, with bells on his head, following his keeper in the most perfect way. He threaded his way through the 'mazes of the law,' in the body of a crowded court, in the most wonderful and clever fashion, like the most accomplished Q. C., and caused some consternation by making his exit at the other side, where no passage had been cleared in the crowd." For notice to produce a dog in court see *Lewis v. Hartley*, 7 C. & P. 405.

¹ *Stephenson v. State*, 28 Ind. 272; *Ihinger v. State*, 53 Ind. 251.

In a suit for injury to chattels, the plaintiff, it has been ruled in Maryland, is not entitled to produce the chattel in court. The injury, it has been said, must be proved by witnesses. *Jacobs v. Davis*, 34 Md. 204.

It is said in North Carolina that the qualities of a stallion for foal-getting cannot be judged by inspection, but may be proved by reputation. *McMillan v. Davis*, 66 N. C. 539.

In Tennessee, in a case tried in 1859, *Stokes v. State*, 5 Baxter, 619; see Alb. L. J. May 6, 1876, where the prisoner was indicted for the murder of a female by hanging, the evidence was, that, near the place where she was hanged, a track was found in the mud, made by a bare foot. The prosecution sought to show that this

track was made by the foot of the prisoner, and brought a pan of mud into court and placed it before the jury—it being proved that the mud was about as soft as the mud where the track was seen. The prisoner was then called upon by the prosecuting attorney to put his foot in the mud, but refused. The court charged the jury that this refusal was not to be taken against the prisoner. The defendant was convicted, but the court on appeal reversed the finding, on the ground that the circumstance had an influence on the jury prejudicial to the prisoner. The court said: "Such testimony should be promptly rejected, and not permitted to go to the jury at all, for jurors with minds untrained to legal investigations and discriminations are sometimes likely to be influenced thereby, although such incompetent evidence may be afterward withdrawn."

Experiments not applicable to conditions existing on the trial cannot be proved by experts. *Hawks v. Charlemont*, 110 Mass. 110; *Com. v. Piper*, 120 Mass. 185.



In patent cases, it should be remembered, experiments before the jury are constantly resorted to.

Whether a witness can be called upon to write his name in court, on questions of identity of hands, is elsewhere considered. *Infra*, § 550.

should be tested in open court. It is only where this is done by the jury, after retiring, when the parties have no opportunity of revising the process, that objection can be made. When the process is conducted openly, as part of the trial of the case, it is a valuable auxiliary in the discovery of truth.¹

¹ The late Rev. F. W. Robertson, in a letter printed by his biographer (*Life and Letters of F. W. Robertson*, ii. 139), gives the following vivid sketch of a trial before Sir John Jervis: "One was a very curious one, in which a young man of large property had been fleeced by a gang of black-legs on the turf, and at cards. Nothing could exceed the masterly way in which Sir John Jervis untwined the web of sophistries with which a very clever counsel had bewildered the jury. A private note-book, with initials for names, and complicated gambling accounts, was found on one of the prisoners. No one seemed to be able to make head or tail of it. The chief justice looked it over and most ingeniously explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack. They were examined in court; every one thought them to be so, and no stress was laid upon the circumstance. However, they were handed to the chief justice. I saw his keen eye glance very inquiringly over them while the evidence was going on. However, he said nothing, and quietly put them aside. When the trial was over, and the charge began, he went over all the circumstances till he got to the ob-

jects found upon the prisoners. 'Gentlemen,' said he, 'I will engage to tell you without looking at the faces, the name of every card upon this pack!' A strong exclamation of surprise went through the court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths and flowers in dotted lines all over, there was a small flower in the right-hand corner of each like this:

"The number of dots in this flower was the same on all the kings, and so on, in every card through the pack. A knave would be perhaps marked thus:  An ace thus:  and so on; the difference being so slight, and the flowers on the back so many, that even if you had been told the general principle, it would have taken a considerable time to find out which was the particular flower which differed. He told me afterwards that he recollected a similar expedient in Lord De Ros's case, and therefore set to work to discover the trick. But he did it while the evidence was going on, which he himself had to take down in writing."

Whether a rule will be granted to exhume a body is discussed in *Grangers' Ins. Co. v. Brown*, Sup. Ct. Miss. 1880; 10 Cent. L. J. 356.

CHAPTER VIII.

BURDEN OF PROOF.

Prevalent theory is that burden of proof is on affirmative, § 319.	Distinction between burden and presumption of innocence, 330.
True view is that burden is on party undertaking to prove a point, § 320.	Burden on defendant of defences purely extrinsic, § 331.
Negatives are susceptible of proof, § 321.	So of licenses and <i>autrefois acquit</i> , § 332.
Burden is properly on actor, § 322.	<i>Alibi</i> not an extrinsic defence, § 333.
Party who sets up another's tort must prove it, § 323.	Otherwise as to provocation, § 334.
Burden on prosecution to prove <i>corpus delicti</i> , § 324.	Necessity must be substantively proved, § 335.
<i>Corpus delicti</i> consists: (1.) of a criminal act; and (2.) of the defendant's agency in such act, § 325.	Discussion as to insanity, § 336.
Identification of body after death not essential, § 326.	When sanity is of essence it must be proved beyond reasonable doubt, § 340.
In infanticide, burden on prosecution to prove prior life of child, § 327.	Burden is on party to prove what it is his duty to prove, § 341.
Death must be connected with injury, § 328.	License to be proved by party to whom such proof is essential, § 342.
Burden as to all essential ingredients of offence is on prosecution, § 329.	Burden of proving formalities is on him to whom it is essential, § 343.
	Court may instruct jury that a presumption of fact makes a <i>prima facie</i> case, § 344.

§ 319. THE same controversy that is agitated in civil issues in reference to the burden of proof is agitated in criminal issues; and in criminal as well as in civil practice the prevalent opinion, backed by high authorities, is, that the question is to be determined by the test of the quality of the proposition to be established. An *affirmative* proposition is to be proved by the party advancing it; not so a *negative* proposition. Among the most authoritative exponents of this view is Mr. Best, in his treatise on Evidence.¹ "The general rule," he declares, "is, that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute, — according to the maxim, *Ei incumbit probatio qui dicit, non qui negat*;" and to this effect he cites Mr. Starkie and Mr.

¹ Best's Evidence, 5th ed. 369; Whart. on Ev. § 353.

Phillipps, sustaining his views by a copious exposition. The negative, it is argued, is not susceptible of proof. An affirmative proposition, therefore, is the only kind of proposition which a party can be called upon to prove.

§ 320. But to this it has been well replied,¹ that there is no proposition which does not blend negation with affirmation, and in which affirmation of one side does not involve a denial of the other side. An *alibi*, for instance, is at once a negation of the defendant's presence at a particular spot at a particular time, and an affirmation of his presence at another place at the same time.

Correct view is that the burden is on a party undertaking to prove a point.

Or the defence of insanity is in like manner both an affirmation and a negation — an affirmation of the existence of disturbing mental conditions, a negation of sanity. Nor is this all. In many cases each party unites, with an affirmation on his part of his own rights, a denial of the rights of his opponent; and the affirmation and denial are so mixed as to be incapable of severance in proof. We may take as illustrating the position cases in which the defendant set up as a bar the maxim *volenti non fit injuria*. You cannot prosecute me, he says, because you consented to my taking the article; and this assertion involves two incidents: (1.) An affirmation of the prosecutor's assent; and (2.) A negation of his right to maintain a prosecution. And in like manner the prosecution's case in rape involves an affirmation and negation. The affirmation is "force," the negation is, "without her consent." These are logically distinguishable elements of the case, but practically the two are so blended that one cannot be put in evidence without the other. If the prosecution, in such cases, is not to prove a negative, then it is not to prove anything. If the prosecution is bound to prove the affirmative, then it must necessarily prove the negative which is bound up, as a matter of fact, in the affirmative.

§ 321. It is asserted, in defence of the rule here contested, that a negative cannot be proved, and hence, as only an affirmative is provable, on the affirming party alone can rest the burden of proving.² To this, aside from the objection already made that all affirmations involve negations of

Negatives are susceptible of proof.

¹ Heffter, Appendix to Weber, 259.

² As to the relations of negative to affirmative testimony see *infra*, § 382.

their contradictory opposites,¹ the following answer is to be made : High probability, as has been already seen,² is the best we can obtain in any case ; high probability may be reached as to the non-existence of many things which are claimed to exist. It may be difficult for me to prove that a thing does not exist in all space, or that certain occult intents may not lurk in the undisclosed recesses of a particular person's heart. But jurisprudence has to do with no such vague domains. Its territory is limited. It inquires whether in a particular spot, at a particular time, open to human observation, a particular thing existed ; or whether by the small range of witnesses, to whom a party at a particular time was visible, he gave signs of the suspected intent. It is possible, within such limited range, to call all witnesses who were likely to have been at the given spot, or observed the given person, at the particular time, and so to approach a negative by gradually exhausting the affirmative. And in many cases, *e. g.* when the disappearance of a party is to be proved, or the absence of a particular thing from a particular place, a negative is the highest kind of proof procurable. The same remark applies to what is often called the highest proof of good character, — *i. e.* that the witness has never heard the character of the person in question discussed.³

§ 322. Aside, therefore, from the rule we have elsewhere considered, that the defendant's guilt, in a criminal prosecution, is to be shown beyond reasonable doubt, it may be stated generally that in criminal as well as in civil prosecutions, whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no further proof to be offered, has on him, at that particular period, the burden of proof, which he must satisfactorily sustain.⁴ The burden at the outset is on the prosecution to make out the defendant's guilt beyond reasonable doubt. If it succeeds in doing this, then the burden is on the defendant to establish reasonable doubt of his guilt, either by contradictory proof, or by proof in confession and avoid-

¹ See Whately's Logic, book ii. c. ii. § 3.

² Supra, § 7; infra, § 809.

³ Supra, §§ 58 *et seq.*

⁴ See Whart. on Ev. § 357, for authorities.

ance.¹ We must remember, at the same time, that the rule imposing the burden of proof on the party advancing a proposition is a very different thing from the presumption of innocence, to be hereafter discussed.² A defendant has the presumption of innocence with him through the whole case. The advantage he derives, however, from the fact that the burden is on the prosecution to make out the points it advances, is only temporary. As soon as this is done to such an effect as to sustain a verdict of guilty, then, should the proof close at that point, the case goes to the jury free from any presumptions arising from the prior imposition of this burden.³ In other words, the rule requiring the *actor* to take on him the burden of proof is one merely of practice, adopted for the proper development of the case, and ceases to operate when the evidence is in. The rule requiring guilt to be made out beyond reasonable doubt is a fundamental sanction of the law, applicable at all stages of a trial. The first rule concerns the *order*, the second, the *weight* of testimony.

§ 323. From the rules settled in respect to torts in their civil relations we may obtain aid in considering the burden of proof in criminal prosecutions. And with respect to torts, according to the Roman law, he who charges *dolus* or *culpa* on another must prove such *dolus* or *culpa*; while he who, on such case being made out, sets up *casus*, or the contributory agency of the plaintiff, must prove such *casus*, or contributory agency.⁴ In our own law, it is an elementary principle that a party setting up a tort has the burden on him to prove such tort.⁵ Thus, as is elsewhere more fully seen, when the cause of action is negligence, the plaintiff must prove the negligence;⁶ when it is deceit, the plaintiff must prove the deceit;⁷ when deceit is set up as a defence, the deceit must be proved by the defendant.⁸ If, to a tort, justification is set up by the de-

Burden is
on party
setting up
tort.

¹ *Infra*, § 330.

² *Infra*, §§ 330, 718.

³ See *Case v. People*, 76 N. Y. 242.

⁴ Weber, Heffter's ed. 173.

⁵ See Whart. on Ev. § 357, for authorities.

⁶ Whart. on Ev. § 359.

⁷ *Huchberger v. Ins. Co.* 5 Biss.

106; *Holbrook v. Burt*, 22 Pick. 546;

Strong v. Place, 4 Rob. N. Y. 385;

Mutual Ins. Co. v. Wager, 27 Barb.

354; *Grimmell v. Warner*, 21 Iowa,

11; *Oaks v. Harrison*, 24 Iowa, 179;

Robinson v. Quarles, 1 La. An. 460.

See Bigelow's Cases on Torts, 1-59.

⁸ *Huchberger v. Ins. Co.* 5 Biss.

fendant, the burden is on him to prove such justification. And so when the defendant, to an action for trespass, sets up probable cause on his part to believe that the land belonged to himself, he must prove such probable cause.¹

§ 324. It used to be said that in cases of circumstantial evidence the *corpus delicti* is to be proved by the prosecution; but that it is otherwise in cases where the evidence is direct. This distinction, however, cannot, as we have seen, be sustained.² In all criminal prosecutions, no matter what may be the kind of evidence on which they rest, the burden is on the prosecution to prove the *corpus delicti*. "I would never," says Lord Hale, "convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony had been committed. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead."³ Equally emphatic is the language of another great judge: "To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions."⁴ And the Roman law is the same: "*Diligenter cavendum est judici, ne supplicium praecipitet, antequam de crimine constiterit.*"⁵ "*De corpore interfecti necesse est ut constet.*"⁶ The death in homicide should be distinctly proved, either by inspection of the body,⁷ or by other evidence strong enough to leave no ground for reasonable doubt.⁸ The test is applicable to all crimes. Thus in a case of horse-stealing, a mere declaration in evidence that the horse had been stolen is not sufficient to prove theft. The facts must ap-

106; *Trenton Ins. Co. v. Johnson*, 4 Zab. 576; *New York Ins. Co. v. Graham*, 2 Duv. 506.

¹ See cases cited in Whart. on Ev. § 359.

² See *supra*, § 11.

³ 2 Hale P. C. 290; *People v. Bennett*, 49 N. Y. 137; *Smith v. Com.* 21 Grat. 809; *State v. Keeler*, 28 Iowa, 553; *Brown v. State*, 1 Tex. Ap. 154; *Black v. State*, 1 Tex. Ap. 368; *Tyner v. State*, 5 Humph. 383; and

see, for an interesting case on the *corpus delicti* in larceny, *R. v. Burton*, 24 Eng. Law & Eq. 551; 6 Cox C. C. 293.

⁴ Lord Stowell, in *Evans v. Evans*, 1 Hagg. C. R. 105.

⁵ Matth. de Crim. in Dig. lib. 48, tit. 16, c. 1.

⁶ Matth. Probat. c. 1, n. 4, p. 9.

⁷ 1 Stark. Evid. 575, 3d ed. c. 5.

⁸ *People v. Ruloff*, 3 Parker C. R. 401.

pear, so that the judge and jury may see whether such facts in point of law amounted to a felonious taking and carrying away of the property in question.¹ In rape, it is essential to prove, as far as this is practicable, that violence was actually committed on the woman;² in burglary, that the house was actually entered;³ in arson, that burning, to some appreciable extent, actually took place;⁴ in riot, that there was an actual disturbance of the public peace.⁵

§ 325. The *corpus delicti*, the proof of which is essential to sustain a conviction, consists of two things: (1.) a criminal act; and (2.) the defendant's agency in the pro-

Corpus delicti con-

¹ Tyner v. State, 5 Humph. 383. See Mitchum v. State, 11 Ga. 615. The reference to facts, which, having in themselves no bearing upon the guilt or innocence of the party, is important as leading to inferences in regard to it, is called in Germany "indicatory evidence." On this point the curious are referred to Mittermaier von Beweise, p. 402; Martin, in Demme's Annalen des Criminalrechts, vol. iii. p. 215; Bauer, Theorie des Anzeigenbeweises; Quistorp Grunds, sec. 676; Henke Darstellung, sec. 99; Tittman Handb. iii. p. 495; Kitka Beweisler, p. 13. Of the old jurists, see Blanci de indiciis, Venet. 1545; Bruni Guido de Suzaria de indiciis et tortura, Lugd. 1546; Crusuis de tortura et indiciis, Francof. 1704; Menochius de Præsumt. Colon. 1686; Tabor de indiciis delict, Giess. 1767; Cocieji de fallæ, Crim. indic. in ejus exer. cur. p. l. uro. 75; Reinhardt de eo quod circa reum ex Præsumt. Convinc et Cond. Just est Erford, 1732; Woltaer femiol, Crim. quæd Capita Ital. 1790; Puettman de Lubrico indic. Indol. Lips. 1785; Nani de indiciis eorumque Ususu, Ticin. 1781; Pagono logica de Probabili Applicata a Guidizi Crimin. Milan, 1806; Heinroth in Hitzig's Zeitzschrift, No. 42. See also Wills's Essay on the Rationale of Circumstantial Evidence. Indications in this relation are divided by Mitter-

maier into: 1st. Those which are drawn from the *particular* relation of the circumstance to the fact in issue, so as to implicate a particular person either as a participant in the crime, or as a possessor of information in regard to it; *e. g.* where a knife, the possessor of which is known, is found at the *locus in quo*. 2d. Those which set out from general observations of human nature, inducing suspicion against particular individuals, by reason of particular moral qualities, motives, information, skill, or demeanor; *e. g.* suspicions on the grounds of enmity towards the deceased, or interest. See also Archiv. des Criminals, xiv. p. 587. There is also a distinction between *immediate* indications (Bayl Beitrage zum Criminale, p. 215; Bentham, traité i. p. 313), which authorize the inference in regard to the fact, without the intervention of other circumstances, and *mediate* ones, which only prove such facts from which a further inference can be drawn, in regard to the very matter at issue; *e. g.* approval of the crime, which leads to the inference of a disposition to commit it.

² Whart. Crim. Law, 8th ed. §§ 551 et seq.

³ Ibid. §§ 759 et seq.

⁴ Ibid. §§ 825 et seq.

⁵ Ibid. §§ 1533 et seq.

sists: (1.) of a criminal act; and (2.) of the defendant's agency in such act. duction of such act.¹ With respect to the former of these, it is the established rule that the facts which are the basis of the *corpus delicti* form a distinct ingredient in the case of the prosecution, to be established beyond reasonable doubt. In homicide, for instance, the fact of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead;² or, at all events, that fragments of it, if in a state of decomposition or disintegration, should be identified.³ Lord Coke illustrates the policy of this rule by cit-

¹ R. v. Burdett, 4 B. & Ald. 1, 95; U. S. v. McGlue, 1 Curtis C. C. 1; Com. v. McKie, 1 Gray, 61; People v. Kennedy, 32 N. Y. 141; People v. Bennett, 49 N. Y. 137; Maher v. People, 10 Mich. 212; Com. v. Johnson, 29 Grat. 811. See this illustrated in Pitts v. State, 43 Miss. 472; and see further infra, §§ 329, 633. (As to presumption of continuance of life see infra, § 810.) The latter feature, namely, criminal agency, is often lost sight of, but is as essential as is the object itself of crime. Acts, in some shape, are essential to the *corpus delicti*, so far as concerns the guilt of the party accused. A. may have designed the death of the deceased, yet if that death has been caused by another, A., no matter how morally guilty, is not amenable, if he has done and advised nothing in respect to the death, to the penalties of the law. Gellius vii. 3. Facta sola censenda dicit (M. Cato) atque in iudicium vocanda, sed voluntates nudas inanesque neque legibus neque poenis fieri obnoxias. Gellius vii. 3. The Roman law speaks expressly to this point: L. 18. D. de poen. (48. 19.) Cogitationis poenam nemo patitur. L. 53. § 2. D. de verb. sign. (50. 16.) . . . nec consilium habuisse noceat, nisi et factum secutum fuerit. L. 225. D. eod. Fugitivus est non is, qui solum consilium fugiendi a domino suscepit, licet

id se facturum iactaverit, sed qui ipso facto fugae initium mente deduxerit . . . ideo fugitivum quoque, et errorem non secundum propositionem solam, sed cum aliquo actu intelligi constat. can. 14. Caus. 33. qu. 3. Dist. i. de poenit. [See, at the same time, can. 29. eod. Si propterea non facis furtum, quia times, ne videaris, intus fecisti, in corde fecisti: furti teneris, et nihil tulisti. can. 30. eod. Si cui etiam non contingat facultas concumbendi cum coniuge aliena, planum tamen aliquo modo sit, id eum cupere, et, si potestas detur, facturum esse, non minus reus est, quam si in ipso facto deprehenderetur.] Comp. Tacitus Annal. xi. 4. Vocantur post haec patres, pergitque Suilius addere reos equites Romanos illustres, quibus Petra cognomentum, at caussa necis ex eo, quod domum suam Mnesteris et Poppaeae congressibus praebuissent. Verum nocturnae quietis species alteri obiecta, tamquam vidisset Claudium spicea corona evinctum, spicis retro conversis: eaque imagine gravitatem annonae dixisset. Quidam pampineam coronam albertibus foliis visam, atque ita interpretatum tradidere, vergente autumno. mortem principis ostendi. Illud haud ambigitur qualicumque insomnio, ipsi fratrique perniciem allatam.

² See Ruloff v. People, 53 N. Y. 179.

³ This was done, as will presently

ing a trial, where an uncle being unable to account for the disappearance of a niece of whom he had the bringing up, was executed for her murder, though it afterwards appeared that she had fled from home, to which, in fact, after a lapse of some years, she returned; and Doctor Hitzig gives several illustrations to the same effect.¹ Lord Hale tells us that in his own time, after the party charged was convicted and executed, the "deceased" returned from sea, where he had been sent against his will by the accused, who, though innocent of the murder, was not entirely blameless.² In our own country, the alleged victim in a conspicuous case made his appearance just in time to save a person who had been indicted for murdering him, and who actually had made a confession of guilt, from being hung.³

§ 326. Should the decease be satisfactorily proved, the identification of the body after death may be dispensed with.⁴

Thus, in a case in England,⁵ the prisoner, a seaman on board of the ship *Eolus*, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by a blow from a large piece of wood, and the second by throwing the deceased into the sea. It appeared in evidence that while the ship was lying off the coast of Africa, where there were several other vessels near, the prisoner was seen one night to take the captain up in his arms and throw him into the sea, after which he was never seen or heard of; but that near the place on the deck where the captain was seen was found a billet of wood, and the deck and part

Identifica-
tion of
body after
death not
essential.

be seen, in the Webster case, where cremation had been attempted by the defendant, by identification of teeth by a dentist. To the same point may be cited, *R. v. Clewes*, 4 C. & P. 221; 2 Wh. & St. Med. J. § 1237; *Udderzook v. Com.* 76 Penn. St. 340.

In *McCulloch v. State*, 48 Ind. 109, it was held a sufficient *prima facie* case of identification that a skeleton, corresponding in age and sex with the deceased, had been found on a spot where the deceased may have been placed. As to identification see further *supra*, § 20; *infra*, § 806. Con-

pare *Com. v. Costley*, 118 Mass. 1; *Wilson v. State*, 43 Tex. 472.

¹ *Der neue Pitoval, &c.*

² 2 Hale P. C. 290. See also Best's Theory, App. Case 5.

³ Boorn's case, 1 Greenl. Ev. § 214. *Infra*, § 804.

⁴ *R. v. Burton*, 1 Dears. C. C. 284; *R. v. Douglass*, 1 Mood. C. C. 480; and cases cited *infra*, § 804. An article discussing the topic in the text will be found in 10 Cent. L. J. 164 (Feb. 29, 1880).

⁵ *R. v. Hindmarsh*, 2 Leach, 648.

of the prisoner's dress were stained with blood. On this, it was objected by the prisoner's counsel that the *corpus delicti* was not proved, as the captain might have been taken up by some of the neighboring vessels; but the court, although they admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed.¹ But something more than mere disappearance must be shown. In an English case a woman was tried for the murder of her child, aged sixteen days, the evidence being that she was proceeding from Bristol to Llandogo, and was seen near Tintern, with the child in her arms, at six P. M.; that she arrived at Llandogo between eight and nine P. M., without the child; which was not afterwards heard from. It was held, that she must be acquitted, as she could not by law either be called upon to account for her child, or to say where it was, unless there was evidence to show that the child was actually dead.² On the other hand, in a remarkable case in Missouri, tried in 1859, the prisoner's confession that he drowned his wife was held sufficient proof of her death, without any evidence that the body was seen after death; but in this case there were other facts from which a killing could be inferred.³

¹ See U. S. v. Williams, 1 Clifford, 5. See also Stocking v. State, 7 Ind. 326. People v. Wilson, 8 Parker C. R. 199.

² R. v. Hopkins, 8 C. & P. 591 — Abinger.

³ State v. Lamb, 28 Mo. 218. See U. S. v. Williams, 1 Clifford, 5.

A brother of the deceased, on a trial for murder, testified that, five months after the alleged murder, he saw a body claimed to be the body of the deceased, and examined it; and he testified to several points of resemblance. He was asked by the prosecution whether it was, in his opinion, the body of the murdered man. It was held that the question was incompetent, the matter being for the jury, the body having been much decomposed, and he having stated all the points of resemblance.

When the head of the murdered man having been found severed from the body, and taken by a physician, was preserved in alcohol and exhibited at the trial, it was held competent, to rebut this evidence, for an expert to state the character of the changes produced by death, and to explain how far such changes had acted on the head in question, but not to answer whether it was possible to identify the head. State v. Vincent, 24 Iowa, 570. Supra, § 312.

Mr. Bentham suggests the illustration of the decomposition of the body in lime, or by any other of the known chemical menstrua, or of its being submerged in an unfathomable part of the sea, and asks whether in such

§ 327. The weight of authority now clearly is that, in cases of alleged infanticide, it must be established that the child had acquired an independent circulation and existence, and it is not enough that it had breathed in the course of its birth;¹ and an eminent and humane

Life must
be proved
or inferred
in infanti-
cide.

American judge extended the rule requiring proof of life at the time of the act to the case of a child some months old, whom the mother, during an attack of puerperal fever, had thrown out of the window of a steamboat.² If, however, a child has been wholly born and is alive, it is not essential that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after birth.³

§ 328. It does not follow that because a person is wounded and dies, the death is necessarily caused by the wound; and the

a case, when the homicide is proved *aliunde*, the defendant is to be acquitted. Bentham, Jud. Ev. 234.

On the trial of Dr. Webster for the murder of Dr. Parkman, the evidence was that in the furnace attached to the defendant's laboratory were found portions of lime and blocks of mineral teeth. These fragments, together with others elsewhere found, having been collected, were identified as those of Dr. Parkman, the teeth having been declared by a dentist to be parts of a set made for the deceased. It was evident that an attempt had been made to destroy the body by fire or other chemical agency, and the testimony of experienced medical gentlemen was taken with reference to this point. Dr. Strong testified that he had frequently found it necessary to get rid of the remains of a subject by fire; and that upon one occasion, wishing to consume the flesh of the body of a pirate, he had placed it upon a large wood fire, and succeeded in concluding the operation in the course of one night, and the forenoon of the next day, although called upon during that time by the police to know what made such a

smell in the street. Bemis's Report of Webster case, 69. Dr. Jackson says "that the flesh of a human body, if cut up into small pieces and boiled in potash, might be dissolved in two or three hours. Next to this, the best substance used in dissolving or disposing of a human body would, I should think, be nitric acid; and the difficulty or danger attendant upon its use, so far as the evolution of noxious vapor is concerned, would depend upon the degree of heat applied. If a gentle heat were used, very little nitrous acid would be given off; but if the acid were boiled there would be a great deal, though the dissolution of the body would be most rapid at a boiling temperature." Bemis's Report of Webster case, 75-6. It is clear that in such cases the *corpus delicti* may be proved inferentially. Ibid.; State v. Williams, 7 Jones (N. C.), 446.

¹ Wills, p. 205; R. v. Poulton, 5 C. & P. 329; 2 Wh. & St. Med. Jur. § 128; Whart. Crim. Law, 8th ed. § 445.

² U. S. v. Hewson, 7 Bost. Law Rep. 361, Story, J.; though see Com. v. Harman, 4 Barr, 269.

³ See R. v. Brain, 6 C. & P. 350.

burden in such cases is on the prosecution to show beyond reasonable doubt that the wound in question produced the death.¹ It may happen, also, where poison has been administered, that death resulted from natural causes.² The presence of poison may be ascertained from the symptoms during life, the *post-mortem* appearances, the moral circumstances, and the discovery of the existence of poison in the body, in the matter ejected from the stomach, or in the food or drink of which the sufferer has partaken.³ And to this should be added proof that the poison thus received into the system was the cause of death.⁴

§ 329. When the defence consists, not in confession and avoidance, but in the traverse of some essential fact relied on by the prosecution, the burden of proof, as has already been noticed, is on the prosecution to satisfy the jury that its case is made out.⁵ Thus on an indictment for assault and battery, when malice or wantonness is set up by the prosecution, the burden is on the prosecution to show that the assault was unjustifiable.⁶ So where a particular intent is in dispute, in similar cases, it must be proved by the prosecution,⁷ and the inference of intent is to be made from the facts in evidence in the whole case.⁸ On an indictment for seduction, the chastity of the prosecutrix being at issue must be shown by the prosecution;⁹ and in like manner the burden of malice in cases of murder is on the prosecution;¹⁰ and the burden of proving time is on the prosecution, in all cases in which time is essential, as, for instance, when a question arises as to the statute of

¹ As to causal relation see Whart. Crim. Law, 8th ed. §§ 152 *et seq.*

² *Infra*, § 790; Wills on Circum. Ev. 209.

³ 2 Wh. & St. Med. J. §§ 321, 1022.

⁴ *Infra*, §§ 787-92.

⁵ Starkie on Ev. 436; *R. v. Burdett*, 4 B. & Ald. 1, 95; *Case v. People*, 76 N. Y. 242; *Turner v. Com.* 86 Penn. St. 54; *Com. v. Johnson*, 29 Grat. 817; *Farris v. Com.* 14 Bush, 362; *Algheri v. State*, 25 Miss. 584; *Bowler v. State*, 41 Miss. 570; but see *State v. Vincent*, 24 Iowa, 750.

⁶ *Supra*, § 325; *Com. v. McKie*, 1 Gray, 61. See *R. v. Allen*, 1 Mood. C. C. 154; *Com. v. Kimball*, 24 Pick. 366; *Com. v. Dana*, 2 Met. 340; *People v. Kennedy*, 32 N. Y. 141; *People v. Bennett*, 49 N. Y. 137; *Bennett & Heard Lead. Cas.* 356.

⁷ *U. S. v. McGlue*, 1 Curtis C. C. 1.

⁸ *Infra*, § 734.

⁹ *West v. State*, 1 Wis. 209. See *Crilley v. State*, 20 Wis. 231; but see *Slocum v. People*, 90 Ill. 274.

¹⁰ *Infra*, § 721; *Farris v. Com.* 14 Bush, 362.

limitations.¹ The principle is, that the burden is on a party to prove all matters which bear such a relation to his case that, if he should omit to prove them, the verdict, if the trial stopped at that particular point, would go against him.²

As will be hereafter seen, when there is doubt as to malice, on a trial of an indictment containing a non-malicious as well as malicious offence, the proper course is to find for the non-malicious offence.³

§ 330. We are sometimes told that after a *prima facie* case on part of the prosecution the burden of proof shifts to the defence. But this involves two errors: (1.) the defence is not required to take up any burden until the prosecution has made out a case sufficient to support a verdict.

Burden
to be dis-
tinguished
from pre-
sumption.

The prosecution cannot say, "I have made out an imperfect case; the defendant must now go on and fill up the gaps I have left." When the prosecution is through its case, then the defendant is entitled to an acquittal if the case of the prosecution is not made out beyond reasonable doubt. When this is done, then, but not before, can the defendant be called upon for his defence. (2.) "Burden of proof" is here confounded with the presumption of innocence, which it requires proof beyond reasonable doubt to overcome. But "burden of proof" is a very different thing, as we have just seen, from the presumption of innocence.⁴ The first, to state once more this important distinction, is a formal rule confined to determining the order in which the proofs are to be brought forward; a rule which ceases to apply as soon as a party has introduced proof sufficient to entitle him to a verdict. The second is a substantial rule, operating during the whole trial, and continuing to operate until the case is finally determined.⁵

¹ Gove v. State, 58 Ala. 391.

As to contributory negligence see Com. v. Boston R. R. 126 Mass. 66.

² State v. Flye, 26 Me. 316; People v. Stokes, 53 N. Y. 164; Turner v. Com. 86 Penn. St. 54; State v. Wingo, 66 Mo. 181; Henderson v. State, 14 Tex. 503; State v. McCluer, 5 Nev. 132; and cases cited in prior notes to this section.

³ Infra, § 721.

⁴ Supra, § 322.

⁵ R. v. Allen, 1 Mood. C. C. 154; Com. v. Kimball, 24 Pick. 366; Com. v. Clark, 2 Met. (Mass.) 24; Com. v. Dana, 2 Met. (Mass.) 340. Compare Bennett & Heard Lead. Cas. 356; West v. State, 1 Wis. 209; Crilley v. State, 20 Wis. 209; Henderson v. State, 14 Tex. 503; State v. McCluer, 5 Nev. 132. Supra, § 325.

The question is discussed in an ar-

§ 331. Where the prosecution makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the burden is on him to make out the defence, whatever it may be, that he presents. He becomes the *actor*, and the duty is on him to make good by proof the points he asserts. When, however, his proof has been adduced, a new and complicated question arises. Is it sufficient for him if he raises a reasonable doubt as to the defence he advances? Or must he establish this defence by a preponderance of proof in order to entitle him to an acquittal? And in answer to this question we may say, in the first place, that when the case of the prosecution is admitted, and the defence is one

Extrinsic defence to be made out by preponderance of proof.

ticle in the Forum for April, 1875. In *Com. v. Knapp*, 10 Pick. 477; *Com. v. Stow*, 1 Mass. 54, it is intimated that when a principal's conviction is averred by record, the accessory must show the principal's innocence beyond reasonable doubt. Compare *State v. Holme*, 54 Mo. 153; *Kingen v. State*, 45 Ind. 518. On the general question of reasonable doubt see *supra*, § 1.

"Now in a case of this sort," says Bigelow, J., when discussing this point in *Massachusetts (Com. v. McKie*, 1 Gray, 61), "if the evidence offered by the government leaves it doubtful whether the injury was the result of accident or design, there can be no question of the right of the defendant to an acquittal, because it is left doubtful whether any criminal act was committed. But can the government, in such a case, on proving simply the injury to the person, rest their case, and call on the defendant to assume the burden of the proof and satisfy the jury that it was accidental, or else submit to a conviction? If so, then a criminal charge can always be shown by proving part of a transaction, and the burden of proof can be shifted upon the defendant, by a careful management of the case on the

part of the government,—so as to withhold that part of the proof which may bear in his favor. But further: the rule of the burden of proof cannot be made to depend upon the order of proof, or upon the particular mode in which the evidence in the case is introduced. It can make no difference, in this respect, whether the evidence comes from one party or the other. In the case supposed, if it is left in doubt, on the whole evidence, whether the act was the result of accident or design, then the criminal charge is left in doubt. Suppose a case where all the testimony comes from the side of the prosecution. The defendant has a right to say that upon the proof, so introduced, no case is made against him, because there is left in doubt one of the essential elements of the offence charged, namely, the wrongful, unjustifiable, unlawful intent. The same rule must apply where the evidence comes from both sides, but relates solely to the original transaction constituting the alleged criminal act, and forming part of the *res gestae*." See also Judge Wells's charge in *Com. v. Sturdevant*, Appendix Whart. on Hom.

exclusively of avoidance, then this defence must be made out by the defendant by a preponderance of proof.¹

§ 332. What defences, however, are so extrinsic as to require to support them a preponderance of proof, as distinguished from those defences as to which it will be sufficient for an acquittal to throw a reasonable doubt on the case of the prosecution? And the first answer is that the principal illustrations of the first class, *i. e.* defences which the defendant must establish by preponderance of proof, are licenses or authorizations from the State,² and pleas of *autrefois acquit*.³

So of licenses and *autrefois acquit*.

§ 333. It has been said that an *alibi* is so far a confession and avoidance that it must be proved by a preponderance of proof.⁴ But an *alibi* not only goes to the essence of guilt, but it traverses one of the material averments of the indictment, that the defendant did then and there the particular act charged. To hold that though the defendant casts reasonable doubt on the averment of his coöperation in the guilty act, he must be convicted unless he establishes such non-coöperation by a preponderance of proof, is to fall into the error above noticed of confounding burden of proof with presumption of innocence. Undoubtedly if the prosecution makes out a case sufficient to secure a verdict of conviction, then the burden is on the defendant to prove his defence. But when his proof is in, then the final question is, are the essential averments of the indictment proved beyond reasonable doubt? And among these essential averments is the defendant's participation in the act charged.⁵

¹ *R. v. Turner*, 5 M. & S. 206; *R. v. Burdett*, 4 B. & Ald. 95; *Blatch v. Archer*, Cowper, 66; *R. v. Brannan*, 6 C. & P. 326; *Smith v. Jeffries*, 9 Price, 257; *U. S. v. Hayward*, 2 Gall. 485; *State v. Crowell*, 25 Me. 171; *Sheldon v. Clark*, 1 Johns. 513; *State v. Morrison*, 3 Dev. 299; *Gening v. State*, 1 McCord, 573; *Farrel v. State*, 32 Ala. 557; *Wheat v. State*, 6 Mo. 455; *State v. Lipscomb*, 52 Mo. 32; *Black v. State*, 1 Tex. App. 368; *Hopper v. State*, 19 Ark. 143. *Contra*, *Mehan v. State*, 7 Wis. 670; *Com. v. Thurlow*, 24 Pick. 374, qualified in *Com. v. Boyer*, 7 Allen. 306; *People v.*

Bodine, 1 Edm. Sel. Cas. 36. Compare *Barrett, in re*, 28 Up. Can. Q. B. 561.

² See cases cited to § 331. *Infra*, § 342.

³ *Infra*, §§ 570-593.

⁴ See *State v. Davidson*, 30 Vt. 377; *Com. v. Webster*, 5 Cush. 124; *Fife v. Com.* 20 Penn. St. 429; *Creed v. People*, 81 Ill. 565; *State v. Vincent*, 24 Iowa, 570.

⁵ *Turner v. State*, 86 Penn. St. 54; *Toler v. State*, 16 Oh. St. 583; *Binns v. State*, 46 Ind. 311; *Howard v. State*, 50 Ind. 190; *State v. Hardin*, 46 Iowa, 623; *State v. Henry*, 48 Iowa, 403; *Pollard v. State*, 53 Miss. 410;

§ 334. Provocation, also, as a defence which goes to negative premeditation and malice, must be regarded as traversing essential ingredients of all offences which require

So of provocation.

Thompson v. State, 5 Humph. 138; State v. Waterman, 1 Nev. 593.

The argument in the text is strengthened by R. v. Hilditch, 5 C. & P. 299, where it was held that when *alibi* was set up the prosecution could not rebut by disputing the *alibi*, since proof that the defendant was at the spot at the time was part of the prosecution's case. But the prosecution can rebut by proving a confession to the contrary by defendant. R. v. Findon, 6 C. & P. 132.

Chief Justice Shaw, in his charge in the Webster case (Bemis's ed. p. 429; 5 Cush. 124), while using language frequently quoted to sustain the position that an *alibi* must be proved by a preponderance of proof, says nothing inconsistent with the rule that when the evidence is all in, every essential element of the case is to be made out beyond reasonable doubt. The following is the passage referred to : —

“ This is a defence often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny, because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defence is equally available, if satisfactorily established, to avoid the force of position, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defence, it is obvious that all testimony tending to show that the accused was in another place at the time of the offence is in direct conflict with that which tends to prove that he was at the place where the crime

was committed, and actually committed it. In this conflict of evidence whatever tends to support the one tends, in the same degree, to rebut and overthrow the other; and it is for the jury to decide where the truth lies.”

But this may be held to amount to no more than that such testimony should be rigidly scrutinized to see whether it establishes reasonable doubt.

Mr. Alison (2 Alison's Criminal Law of Scotland, page 624) goes much further : —

“ The defence of *alibi* is of all others the most decisive when duly substantiated; but the evidence adduced in support of it requires to be minutely considered, and the plea is not to be sustained, unless the circumstances were such as to render it impossible that the crime could have been committed.

“ One of the most ordinary pleas resorted to by a panel is that of *alibi*; and doubtless when duly qualified and fully proved, it is among the most effectual of any; but it requires to be carefully scrutinized, both as to the sufficiency of the evidence and the inference to be drawn from the facts, if fully proved; because the plea is not conclusive unless the *alibi* is circumstanced and qualified in such a manner as makes it not only unlikely, but impossible, that the panel could have done the deed at the time and place libelled; the proof of *alibi* is in most cases a direct impeachment of the veracity of the prosecutor's witnesses, which is not to be admitted on light grounds, and because it is a plea of that short and simple sort, with respect to which the panel's witnesses can easily contrive an uniform and false story, such as the prosecutor

proof of premeditation and malice. Hence, while, according to the distinction just stated, the burden is on the defendant to

cannot well disprove, as he can cite no new witnesses in reply. Hume, ii. 410, 411; Burnet, 596. Indeed, all the circumstances may be true, and the falsehood lie only in applying them to a different day or hour from that on which they actually occurred, and it is by that contrivance that pleas of *alibi* are in general rendered so difficult to disprove. For these reasons, there is no defence which requires to be so minutely considered, or in which the searching force of able cross-examination is frequently more required."

Again (pages 626-7), he says:—

"In the next place, it is essential that the plea of *alibi* shall be adequately proved. In judging of this matter, the court and the jury have chiefly to consider the character of the witnesses who speak to the fact, the manner in which they give their evidence and the comparative weight due to them, and the witnesses for the prosecution. It is frequently no easy matter, even by the most skilful examination, to detect the falsehood of an *alibi*. By making the witnesses speak to the events which really took place on a particular day, and merely applying them to the day libelled, they are sometimes able to present a story to the jury which hangs remarkably well together in all its parts, and wears all the air of truth, because the events described are true in themselves in relation to each other, and only false when applied to the particular day in question. The only way in which it is possible to expose an artfully got up imposture of this description is by a minute and rapid cross-examination of the witnesses applied to the circumstances previously detailed in evidence by the witnesses for the prosecution, in order to detect falsehood in some

inconsiderable and not previously considered particular. Frequently the trick may be exposed by asking the *alibi* witnesses, after they have fully and minutely narrated the events of the day libelled, to give an equally detailed account of the preceding and succeeding days; and their total inability to do that shows that, with reference to that particular day, they must have been practised upon. Of course the weight due to their testimony is increased if they can point out some particular circumstance, as by an examination before the magistrate a few days after, in relation to the matter libelled, or by hearing that the accused was apprehended upon the charge, and being thus led to turn what they knew of it over in their own minds, which led to its being fixed in their memory; or if they can exhibit some entry in an account or written document, duly proved, and bearing the marks of authenticity which confirms their story as to date or time. But, after all, the jury are frequently reduced to the difficult and painful duty of weighing the testimony on the one side against those on the other; and in doing so it is their duty, on the one hand, to recollect that the presumption of law as well as of justice is against the prosecutor, and therefore that if the evidence on both sides is equal, or nearly so, they should incline to the side of mercy; and on the other, how much more easy it is to get up a false story of *alibi*, where the whole to be proved is the presence of the prisoner at a particular place at a particular time, than a false account of all the minute particulars relating to so many different matters, which is necessarily implied in the proof of a false charge against a prisoner."

prove provocation, in all cases when he opens this defence, yet, when the evidence on both sides is closed, he is entitled to an acquittal if he has offered proof enough to cast a reasonable doubt on the averments of malice and premeditation when thus essen-

We must remember, however, in reference to Mr. Alison's views, that they are based on the Scotch rule requiring only preponderance of proof to a conviction.

See also Burrill's Circumstantial Evidence, page 517.

In *Com. v. Costley*, 118 Mass. 1, the defendant requested the judge to instruct the jury that he was not bound to show by evidence where he was from six o'clock in the afternoon of the alleged day of the murder, to two o'clock the next morning, and that the jury should draw no inference from any failure so to do. The judge declined to give this instruction, but ruled that the question was entirely for the jury; that if a prisoner was shown to be in any connection with the transaction which seemed to them to put into his possession facts which, if innocent, he would use, which he could use without going upon the stand himself, the withholding of those means to explain the circumstances might be considered by the jury, in connection with the other testimony, in determining how far he was responsible for the occurrence. The Supreme Court held that the defendant had no ground for exception to this charge. See *Walker v. State*, 37 Tex. 366.

In *People v. Larned*, 7 N. Y. 448, Judge Mason charged the jury as follows:—

“That the defence interposed by the prisoner was what was in law denominated an *alibi*, and if the three witnesses called by him to sustain it had testified truly, the prisoner should be acquitted; that it was however in-

sisted by the prosecution that the defence was a fabricated one and sustained by perjury; that this issue the jury were to determine; that it was undoubtedly true that the defence of an *alibi* is not unfrequently the felon's plea; that when a prisoner finds himself surrounded by facts and circumstances which threaten to overwhelm him and establish his guilt, he not unfrequently resorts to this defence, and seeks to maintain it by perjured witnesses; and that it was the remark of an eminent judge in England that ‘in his opinion more perjury had been committed in defences of this description than in all other defences interposed in criminal trials.’ ”

This is no doubt a proper line of remark in cases where the *alibi* is evidently false. It should be remembered, however, that to throw discredit on this line of evidence is to throw discredit on a defence which is one of the chief safeguards of innocence. *Albin v. State*, 63 Ind. 598; *Sullivan v. People*, 31 Mich. 1; *Spencer v. State*, 50 Ala. 124; *State v. Jaynes*, 78 N. C. 504; *State v. Byers*, 80 N. C. 426; *State v. Watson*, 7 S. C. 63. That a fraudulent *alibi* reacts see *Porter v. State*, 55 Ala. 95. *Infra*, § 742. That it must cover the whole time see *Briceland v. Com.* 74 Penn. St. 463; *Donnelly v. Com.* 6 Weekly Notes, 104; *Johnson v. State*, 57 Ga. 14. And it is error to charge a jury that a failure to establish an *alibi* when attempted raises by itself a presumption against a defendant. *Turner v. Com.* 86 Penn. St. 54. See *State v. Williams*, 1 Williams, Vt. 724.

tial. It is otherwise, however,¹ as we have seen, when the defence does not traverse any averment of the indictment.

¹ In New York, in 1866, it was declared by the Supreme Court that where the fact of homicide is made out, and the defendant sets up justification, the burden is on him to make out this defence beyond reasonable doubt. *Patterson v. People*, 46 Barb. 626. But in 1870 this was expressly overruled, and the law announced to be that the facts of provocation and of necessity, when offered to prove an extrinsic defence, and not to negative the essential averments of the indictment, must be established by preponderance of testimony, by the rules that obtain in civil actions. *People v. Schryver*, 42 N. Y. 1.

In the Court of Appeals, in June, 1873, in the same case, Judge Rapallo adopted the same view. See *Stokes v. People*, 53 N. Y. 164.

On the other hand, when the defence traverses malice, or other material averment, if in such case such averment is not, on the whole evidence, proved beyond reasonable doubt, it has been held in numerous cases that the defendant should be acquitted. *Com. v. Drum*, 58 Penn. St. 9; *O'Mara v. Com.* 75 Penn. St. 424; *State v. Willis*, 63 N. C. 26; *State v. Haywood*, Phill. (N. C.) 376; *State v. Vincent*, 24 Iowa, 570. In Iowa, in 1871, in a prosecution for murder, wherein the plea of self-defence was relied upon, the court, after instructing the jury that if they found that the prisoner killed the deceased in self-defence, they should acquit, further charged: "If, however, you find that the defendant inflicted the blow upon the deceased that caused his death, then the burden of proof is upon the defendant to show that he did it in self-defence." It was held

that the instruction was erroneous, on the ground that, in effect, it required the defendant to establish, by a preponderance of evidence, that he acted in self-defence, and excluded him from the benefit of an acquittal, if, under the facts shown, there existed a reasonable doubt that his act was wilful. *State v. Porter*, 34 Iowa, 131. "The rule is different when the matter of defence is wholly disconnected from the body of the offence." *Day, J.*, 34 Iowa, 131, citing *Tweedy v. State*, 5 Iowa, 434, and cases cited; *State v. Morphy*, 33 Ibid. 270; *State v. Felter*, 32 Ibid. 49.

"To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offence as the act which causes the death. Without the concurrence of both the crime cannot exist; and, as every man is presumed to be innocent of the offence of which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offence, — to the malice as well as to the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof as to each rests equally upon the prosecution, though the one may admit and require more proof than the other, — malice in most cases not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it was done." *Christiancy, J.*, *Maher v. People*, 10 Mich. 212, as adopted by *Fancher, J.*,

§ 335. When the defendant sets up that he acted under necessity, — *e. g.* under command of a superior officer in time of war; or under compulsion of any kind, the burden is on him, in such cases, to prove the defence he sets

Necessity
to be sub-
stantially
proved.

Stokes v. People, N. Y. Sup. Ct. May, 1873.

The view expressed in *Silvus v. State*, 22 Oh. St. 90, that the burden of self-defence is on the defendant, and to be established by preponderance of proof, is affirmed in *Weaver v. State*, 24 Oh. St. 584.

That upon doubt as to malice jury may convict of manslaughter see *infra*, § 721. See further, as to burden in provocation, *People v. Ah Kong*, 49 Cal. 7; *People v. West*, 49 Cal. 610.

In Massachusetts, much confusion has been caused on this difficult question by the Supreme Court, in its earlier rulings, adopting the now obsolete distinction between "facts" and "inferences." See *supra*, § 11. Thus, in a much disputed case of homicide, *Hubbard, J.*, charged the jury, in language said to have been drawn up by *Shaw, C. J.*, in answer to the question, "Were the jury instructed by the court that the prisoner was to prove provocation, or mutual combat, and was he to have the benefit of any doubts upon the subject?" as follows: "It is hardly possible to give a direct answer, affirmative or negative, to the question of the jury, without some explanation. The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law" (of fact?) "is that it is malicious, and an act of murder. It follows, therefore, that in such cases the proof of matter of excuse or extenuation lies on the accused, and this may appear either from evidence adduced by the prosecution, or evidence offered by the defendant.

But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the *fact upon which the excuse or extenuation depends according to the preponderance of evidence*. Where there is evidence on both sides, it is hardly possible to imagine a case in which there will not be a preponderance of proof on one side or the other. But if the case or the evidence should be *in equilibrio*, the presumption of innocence will turn the scale in favor of the accused, that is, in a case like the present, in favor of the lesser offence. *But if the evidence, in the opinion of the jury, does not leave the case equally balanced, then it is to be decided according to its preponderance.*" The jury returned a verdict of guilty of murder, and on motion for a new trial, *Shaw, C. J.*, in 1856, delivered the opinion of a majority of the court, sustaining the charge; *Wilde, J.*, dissenting. *Com. v. York*, 9 Met. 93. See this case reported and reviewed in 2 *Benn. & Heard's Lead. Cases*, 504. No doubt the last passage in italics, if taken by itself, would indicate that malice (*i. e.* the antithesis of hot blood) is to be decided by a preponderance of testimony. But malice is not a fact, in the ordinary sense of the term, but an inference from facts; the *facts* from which hot blood, as negating malice, is inferred, are to be established by a preponderance of testimony; and so it is stated in the passage last italicized, which must be taken as explaining the passage first italicized. But after such facts are so established,

up, and he must establish this by preponderance of proof, — it being an extrinsic defence.¹ At the same time, if the defence goes to negative malice, and malice is an essential part of the case of the prosecution, then, if on the whole evidence there be reasonable doubt as to malice, there should be an acquittal.

§ 336. By the common law every man is presumed to be sane until the contrary be proved; and when insanity is set up by a party, it must be proved as a substan-

Discussion
as to in-
sanity.

then, if there is a reasonable doubt as to malice, the defendant must be acquitted of murder.

In Webster's case, Shaw, C. J., said: "The implication of malice arises in every case of intentional homicide; and the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are in fact circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, *and there are no circumstances disclosed tending to show justification or excuse*, there is nothing to rebut the natural presumption of malice." Com. v. Webster, 5 Cush. 316. See Com. v. Hardiman, 9 Gray, 136; State v. M'Allister, 11 Shepley, 139; State v. Upham, 38 Me. 261; Satterwhite v. State, 28 Ala. 65. This simply states that an un rebutted presumption of malice remains in full force. It does not touch the question of conflicting presumptions.

In 1855, in the same court, in a case where the deceased was struck down in a fight by the defendant, both being at the time much intoxicated, and where the defendant a few minutes after struck the deceased on the head when he was down, the defendant's

counsel proceeded to argue to the court in support of the dissenting opinion of Wilde, J., in York's case, "when he was interrupted by the chief justice, who remarked that the decision of York's case was, that when the killing is proved to have been committed by the defendant, *and nothing further is shown*, the presumption of law is that it was malicious and an act of murder; and that this was inapplicable to the present case, where the circumstances attending the homicide were fully shown by the evidence." And on this point the chief justice instructed the jury as follows: "The murder charged must be proved; the burden of proof is on the Commonwealth to prove the case; all the evidence, on both sides, which the jury find true, is to be taken into consideration; and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt that it was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter." Com. v. Hawkins, 3 Gray, 463. See also Com. v. Heath, 11 Gray, 303; State v. Knight, 43 Me. 11; State v. Patterson, 45 Vt. 308; Tweedy v. State, 5 Iowa, 434; State v. Bertrand, 3 Oreg. 61.

¹ Whart. Crim. Law, 8th ed. §§ 95 et seq.

tive fact by the party alleging it, on whom lies the burden of proof.¹

Three distinct theories have been propounded as to the degree of evidence requisite to justify a conviction on the issue of insanity.

§ 337. The first is, that insanity, as a defence of confession and avoidance, must be proved beyond reasonable doubt; and that, unless this be done, the jury, the case of the prosecution being otherwise proved, are to convict. This is expressed by Hornblower, C. J., as follows: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty."² To the same effect several English authorities may be cited.³

§ 338. The second is, that the jury (at least to find an affirmative verdict of lunacy) are to be governed by the *preponderance* of evidence; and are not to require insanity to be made out beyond reasonable doubt. This view has been expressed in Maine;⁴ in Massachusetts;⁵ in New York;⁶ in Ohio;⁷ in West

¹ See *infra*, § 729; *R. v. Stokes*, 3 C. & K. 188; *R. v. Taylor*, 4 Cox C. C. 84; *R. v. Layton*, 4 Cox C. C. 149; *U. S. v. Lawrence*, 4 Cranch C. C. 514; *Atty. Gen. v. Parnter*, 3 Brown C. C. 441; *U. S. v. McGlue*, 1 Curtis, 1; *Com. v. Eddy*, 7 Gray, 583; *State v. Spencer*, 1 Zab. 202; *State v. Brandon*, 8 Jones (N. C.), 463; *State v. Starke*, 1 Strobb. 479; *State v. Brinyea*, 5 Ala. 244; *People v. Myers*, 20 Cal. 518; *Boswell v. Com.* 20 Grat. 860; *Loeffner v. State*, 10 Oh. St. 599.

² *State v. Spencer*, 1 Zab. 202. See, as countenancing this view, *State v. Hoyt*, 46 Conn. ; *Clark v. State*, 12 Ohio, 495; *Bonfante v. State*, 2 Minn. 123.

³ 1 W. & St. Med. J. §§ 225, 226; *McNaghten's case*, 10 Cl. & Fin. 200; *R. v. Stokes*, 3 C. & K. 188; *R. v. Tay-*

lor, 3 Cox C. C. 84; *R. v. Layton*, 4 Cox C. C. 149.

⁴ *State v. Lawrence*, 57 Me. 574.

⁵ *Com. v. Eddy*, 7 Gray, 583; *Com. v. Rogers*, 7 Met. 500; *Com. v. Heath*, 11 Gray, 303. See, however, *Com. v. Pomeroy*, in Appendix to Whart. on Hom. where the older doctrine is much and justly modified.

⁶ *Ferris v. People*, 35 N. Y. 125; *Walter v. People*, 32 N. Y. 147. In *Flanagan v. People*, 52 N. Y. 467 (1873), Andrews, J., giving the opinion of the Court of Appeals, said:—

"In *People v. McCann* (16 N. Y. 58) it was held that it was error to charge the jury in a criminal case that the insanity of the prisoner must be proved beyond a reasonable doubt to entitle him to an acquittal. This was the extent of the decision. The question was not in the case, whether

⁷ *Loeffner v. State*, 10 Oh. St. 599; *Bond v. State*, 23 Oh. St. 349.

Virginia;¹ in North Carolina;² in Louisiana;³ in Missouri, it being there now held that "preponderance," but not "*clear* preponderance," is required;⁴ in California;⁵ in Iowa;⁶ in Arkansas;⁷ and in Pennsylvania, though in the latter State the "preponderance" must be "satisfactory."⁸

the prisoner would be entitled to the benefit of a doubt upon the evidence introduced by him to establish the defence. What is said by the learned judges upon that subject is entitled to such weight as their character and learning and their arguments entitle it to. See *People v. Schryver*, 42 N. Y. 1.

"It is not necessary for us to consider the question in this case; but we prefer to leave it precisely where the cases cited leave it, an open question, so far as judicial authority in this State is concerned." But see *Brotherton v. People*, 75 N. Y. 154, 162-3, as cited *infra*, § 340.

¹ *State v. Strauder*, 11 W. Va. 747.

² *State v. Starling*, 6 Jones, 366; *State v. Brandon*, 8 Jones, 468.

³ *State v. Coleman*, 27 La. An. 691.

⁴ *State v. Hundley*, 46 Mo. 414 (1870), somewhat qualifying *State v. Klingler*, 43 Mo. 127. But in *State v. Smith*, 53 Mo. 267, the tendency of the argument of the court is to require sanity to be proved beyond reasonable doubt. "Insanity is a simple question of fact, to be proved like any other fact, and any evidence, which reasonably satisfies the jury that the accused was insane at the time the act was committed, should be deemed sufficient." *Vories, J., State v. Smith*, 53 Mo. 270, citing *State v. Hundley*, 46 Mo. 414; *State v. Klingler*, 43 Mo. 127; *State v. McCoy*, 34 Mo. 531. See *State v. Smith*, 53 Mo. 267; *State v. Simms*, 68 Mo. 305.

⁵ *People v. Coffman*, 24 Cal. 230;

People v. Wilson, 49 Cal. 13; *People v. Bell*, 49 Cal. 486.

⁶ *State v. Felter*, 32 Iowa, 50; *State v. Bruce*, 48 Iowa, 336.

⁷ *McKenzie v. State*, 26 Ark. 334.

⁸ "The judge instructed the jury that they must be satisfied *beyond a reasonable doubt* that the prisoner was insane at the time the act was committed. This statement is too stringent, and throws the prisoner upon a degree of proof beyond the legal measure of his defence. That measure is simply proof which is satisfactory — such as flows fairly from a preponderance of the evidence. It need not be beyond doubt. A reasonable doubt of the fact of insanity, on the other hand, is not sufficient to acquit upon a defence of insanity. This has been held in several cases. *Ortwein v. Com.* 26 P. F. Smith, 414; *Lynch v. Com.* 27 P. F. Smith, 205; *Brann v. Com.* 28 P. F. Smith, 122. Sanity being the normal condition of men, and insanity a defence set up to an act which otherwise would be a crime, the burden rests upon the prisoner of proving his abnormal condition. But the evidence of this need be only satisfactory, and the conclusion such as fairly results from the evidence. Where the evidence raises a balancing question, and the mind is brought to determine its preponderance, there may be a doubt still existing in the mind, yet the actual weight may be with the prisoner; and this proof should be considered satisfactory. In cases of conflicting evidence, the preponderance must govern, there being no other rational means of decision.

§ 339. A third view, sustained by several authoritative courts, is that in such an issue the *prosecution* must prove *sanity* beyond reasonable doubt.¹

§ 340. The conflict which has just been noticed has arisen from the habit of viewing the plea of insanity as an ordinary defence of the nature of confession and avoidance. Such, however, is not the case. It is rather in the nature of a plea to the jurisdiction, or a motion to change the venue. The defendant, through his counsel and friends, comes in and says that he is not amenable to penal jurisdiction. He is not a moral agent; he is *insane*; he is not the object of penal discipline. Such a plea may be regarded, when it is set up for the purpose of showing entire unamenability to penal process, as a purely extrinsic application, to be made out by a preponderance of proof. Otherwise the law approaches those charged with crime as a wolf in sheep's clothing. To hold that a reasonable doubt as to a defendant's sanity should require

But if we say, in such a case, it must be satisfactory beyond a reasonable doubt, it is evident the expression implies more than a mere preponderance. It is difficult to define the precise difference between the two measures, yet we are conscious in our own minds that to be convinced beyond a reasonable doubt is a severer test of belief than to be satisfied that the preponderance falls on that side." Agnew, C. J., *Meyers v. Com.* 83 Penn. St. 131. See further *Pannell v. Com.* 86 Penn. St. 260, to the same general effect.

In *Sayres v. Com.* 88 Penn. St. 290, the trial judge charged the jury as follows:—

"As the law presumes sanity to be the normal condition of the prisoner, and insanity an abnormal condition, the burden rests on him to prove his insanity as an excuse. . . . The evidence, therefore, which is intended to establish this defence, must be satisfactory to the jury, and the conclusion such as fairly results from the

evidence." This was held to give no ground for exception.

¹ As inclining to this view see *State v. Bartlett*, 43 N. H. 224; *People v. Garbutt*, 17 Mich. 9; *Underwood v. People*, 32 Mich. 1; *Hopps v. People*, 31 Ill. 385, qualifying *Fisher v. People*, 23 Ill. 283; *Chase v. People*, 40 Ill. 352; *Ogletree v. State*, 28 Ala. 701; *State v. Crawford*, 11 Kans. 32; *Dove v. State*, 8 Heisk. 348, cited *infra*; *Smith v. Com.* 1 Duv. 224 (though in a subsequent case this was qualified by saying that a *mere* doubt was not enough; the doubt must be truly reasonable; *Kriel v. Com.* 5 Bush, 362). See also *State v. Jones*, 50 N. H. 370; *Polk v. State*, 19 Ind. 170; *Stevens v. State*, 31 Ind. 485; *Bradley v. State*, 31 Ind. 492; *State v. Marler*, 2 Ala. 43; and see a learned note in *Am. Law Reg.* for Jan. 1875, p. 25; *People v. McCann*, 16 N. Y. 58. (The meaning of the latter case is examined in Mr. H. L. Clinton's argument in the N. Y. Senate, April 15, 1873.)

his permanent imprisonment as a dangerous lunatic would be to turn a maxim, apparently benignant, into an instrument of gross oppression. A man is tried for an assault. The jury have a reasonable doubt of his sanity, and find him, under the statutes, a dangerous lunatic; and this is a necessary consequence of the doctrine here criticised. Yet from such a consequence we revolt. To extinguish a man's civil existence, — to place him under close confinement for life, — to deprive him of the control of his estate, and of access to his family, something more than reasonable doubt should be required. For so total an extinction, not only of liberty but of civil and social capacity, we should at least exact a preponderance of proof. The difficulty is attributable to the fact that most cases in which insanity comes up as a defence are those of murder; and to be decreed to be *civilter mortuus*, and to be imprisoned as a dangerous lunatic, is better than to be hung. But the principle we are here discussing applies to all criminal prosecutions; and if a reasonable doubt as to sanity requires a verdict of dangerous lunacy, under the statutes, in a homicide case, it requires such a verdict in a case of assault. If in the former case the court must instruct the jury to give a verdict of dangerous lunacy if they have a reasonable doubt, the same instruction must be given in the latter case.

But supposing insanity is set up, not for the purpose of transferring the defendant to the category of non-responsible agents, but for the purpose of meeting the allegation of malice in the indictment, does the same rule apply? Supposing, in other words, the defence is, — “We do not say that the defendant is a maniac, or an idiot, who is to be put in custody as permanently and dangerously insane, and is to have his civil existence terminated; but we say that he is predisposed to insanity, and that when excited his reason is so swept away by the current of this insane tendency, that he is incapable of deliberate intent.” Are we here to concede that reasonable doubt as to the defendant's capacity in this respect is to acquit; or must we here also, in order to acquit, require that such incapacity should be made out by a preponderance of proof? Falling back on the reasoning heretofore expressed,¹ we must hold that when a defendant is charged with a deliberate homicide, and he offers evidence to

¹ See Whart. on Hom. §§ 34, 194, 660. *Infra*, § 721.

show that the condition of his mind was such (by reason of insane predisposition) that he was incapable at the time of deliberation, then, if the jury have a reasonable doubt as to such capacity, he is to be acquitted of the higher grade and convicted of the lower grade of the offence. And this is conceded even by those courts who hold that on the question of insanity, as an absolute bar, there must be a preponderance of proof.¹ Indeed, when we examine the reasoning of the courts of Pennsylvania and Massachusetts in the group of cases which relate to the question of reasonable doubt, we find that the distinction here expressed lies at the basis of their adjudications. To find a defendant irresponsible requires a preponderance of proof. But whenever there are various grades in an offence, then a reasonable doubt as to whether the higher grade exists requires a finding for the lower grade. And whenever intent is a necessary constituent of the offence, then a reasonable doubt as to intent requires an acquittal. If there be a logical inconsistency in the views just expressed, such inconsistency must be defended by an appeal to the maxim *in dubio mitius*.² If, on an indictment for an assault, insanity is suspected by the jury, and if a verdict of insanity would subject the defendant to far more rigorous penalties than a conviction of assault, then there can be no verdict of insanity, if there is only a reasonable doubt of sanity. On the other hand, on an indictment for murder, where a conviction would impose severer penalties than a verdict of insanity, doubts must tell in favor of the more benignant application of the law.

¹ This distinction is thus ably put by Church, C. J., in *Brotherton v. People*, 75 N. Y. 162-3:—

“Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. Whoever denies this, or interposes a defence based on its untruth, must prove it; the burden, not of the general issue of crime by a competent person, but the burden of overthrowing the presumption of sanity and of showing insanity, is upon the person alleging it, and if evidence

is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt, and to an acquittal.”

² This is emphatically affirmed in the Roman law. “In poenalibus causis benignius interpretandum est.” L. 155. § 2. D. 50. 17.

§ 341. As a rule for regulating the time and mode of producing evidence (not, it will be remembered, for the purpose of adding any presumption to affect the merits), we may hold that when a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact, whether the proposition be affirmative or negative.¹ Thus where the defendant's whereabouts at the time of the crime is in question, the burden is on him to show where he was, as evidence to this effect is supposed to be peculiarly in his power; though the inference is purely one of fact, not of law.² So where

Burden is on party to prove what it is his duty to prove.

¹ *Apoth. Co. v. Bentley*, R. & M. 159; *Great West. R. R. v. Bacon*, 30 Ill. 347; *State v. McGlynn*, 34 N. H. 422; *State v. Keggon*, 55 N. H. 19; *Ford v. Simmons*, 13 La. An. 397. See limitations of above in *Chaffee v. U. S.* quoted *infra*, § 344.

² *Toler v. State*, 16 Oh. St. 583. See *White v. State*, 31 Ind. 262; *State v. Josey*, 64 N. C. 56.

In a case that came before the New York Court of Appeals in 1865, it appeared that the plaintiff in error had been indicted for the murder of Owen Thompson, and tried and convicted in the lower court, after which the case came before the Court of Appeals on exceptions to the judge's charge.

The evidence against the prisoner went to prove that the deceased was killed opposite a cattle yard, leased by the prisoner only the day previous, and the abstraction from his person of his pocket-book and a large sum of money; that the last time Thompson was seen alive was in company with the prisoner; that the day following the murder the prisoner disappeared from the place where the murder was committed; that he was poor and destitute for a long time previous and up to the time of the murder, and that he was possessed of a large sum of money the night after the murder. Other circumstances appeared in evidence

against the prisoner, such as having made false representations, &c., &c.

The prisoner introduced no evidence to prove his whereabouts on the day of the murder, or how he came into possession of the money. The judge charged the jury "that when it is in the power of a party, if he is not the man, to show where he was on that day, at some time of the whole day, and he living in a place where he is well known, that which before may have been regarded as highly probable ripens into certainty." Also, "He has had abundant opportunity, also, of showing where he got that money, but he has not done it. Circumstantial evidence of this sort, when left unexplained, if in the power of the prisoner to explain if not true, becomes of a *conclusive* character."

The Court of Appeals held this charge to be erroneous; "that it was unnatural and illogical, and fatal alike to innocence and guilt." The true rule of law in such cases is, that an absence of an attempt to account for the person's whereabouts, when it appears to be in his power to do so, is not, in law, conclusive of the facts in dispute, but is strong presumptive evidence against him. *Gordon v. People*, 33 N. Y. 501. But this must be taken subject to what is above stated, that reasonable doubt as to any essential to the case should acquit.

proceedings were taken for the contravention of an order of the English privy council under the Contagious Diseases (animals) Act of 1869, ordering that a person having in his possession animals affected with any contagious disease should with all practicable speed give notice of the fact to a police constable, it has been held that, on proof of the existence of the disease to the defendant's knowledge, the *onus* lay upon him of showing that he gave the necessary notice.¹ A court may therefore properly hold, without in any way touching the question of degree of proof, that so far as concerns the mode of offering proof, it is incumbent on a party who has particular proof in his exclusive possession to produce such proof, or suffer the consequence.

§ 342. We have already seen that, as a general rule, a license to do a particular thing, when a purely extrinsic defence, is to be proved by the defendant by a preponderance of proof.² Whether a license is so extrinsic depends upon the concrete case. When the non-existence of the license is not averred in the indictment, and when the license is particularly within the knowledge of the party holding it, the burden is on him to produce such license, in all cases in which the existence of the license is in question.³ On the other hand, when the non-existence of the license is averred in the indictment, and is essential to the case of the prosecution, it is proper, if we follow the rules already announced, to hold that non-license must be proved by the party to whose case such proof is essential.⁴ In many jurisdictions the doubt has

¹ *Huggins v. Ward*, 21 W. R. 914; *Powell's Ev.* 4th ed. 293.

² *Supra*, § 331. As to pleading in such cases see *Whart. Cr. Pl. & Pr.* § 238-9; *Whart. Crim. Law*, 8th ed. § 1499. As to proof in liquor prosecutions see *Whart. Crim. Law*, 8th ed. § 1500.

³ *Smith v. Jeffries*, 9 Price, 257; *Morton v. Copeland*, 16 C. B. 517; *Bluck v. Rackman*, 5 Moo. P. C. 305, 314; *R. v. Turner*, 5 M. & S. 205; *Apothecaries' Co. v. Bentley*, 1 C. & P. 538; *R. & M.* 159; *U. S. v. Hayward*, 2 Gall. 485; *State v. Crowell*, 25 Me.

174; *State v. Whittier*, 21 Me. 341; *State v. Woodward*, 34 Me. 293; *State v. McGlynn*, 34 N. H. 422; *Bliss v. Brainerd*, 41 N. H. 256; *Garland v. Lane*, 46 N. H. 245; *State v. Keggon*, 55 N. H. 19; *Gening v. State*, 1 McCord, 573; *State v. Morrison*, 3 Dev. 299; *Wheat v. State*, 6 Mo. 455; *Medlock v. Brown*, 4 Mo. 379; *State v. Edwards*, 60 Mo. 490; *State v. Lipscomb*, 52 Mo. 32. See note in 1 Bennett & Heard's *Lead. Cas.* 347, discussion in *State v. Perkins*, 53 N. H. 435.

⁴ *Com. v. Thurlow*, 24 Pick. 374;

been removed by statute.¹ At common law it would seem that where licenses are rare and exceptional, then we may hold that the improbability of a license in each particular case, taken in connection with the rule that a party must produce all evidence peculiarly within his own knowledge, may throw on the defendant the burden of proving license. But when the prosecution has the burden of proving the negative, full proof "is not required, but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party."² And the want of authority is to be inferred from circumstances.³

§ 343. When the law makes the validity of a document depend upon certain formalities, then these formalities must be duly proved by the party offering the document. If a statute, for instance, makes a document inoperative unless duly registered or stamped, then the document cannot be put in evidence without proof of such registry or stamp. But a *prima facie* compliance with the law in this respect is sufficient to make out the case.⁴ If the document is on its face duly executed, then it will be presumed⁵

Burden of proving formalities on him to whom they are essential.

Com. v. Locke, 114 Mass. 288; Kane v. Johnston, 9 Bosw. 154; State v. Evans, 5 Jones (N. C.), 250; Mehan v. State, 7 Wis. 670; State v. Hirsch, 45 Mo. 429; State v. Richeson, 45 Mo. 575.

In Conyers v. State, 50 Ga. 103, it was held that on an indictment against a keeper of a billiard table for permitting a minor to play without consent of parents, the burden of proving non-consent of parents was on the prosecution.

The topic in the text is further discussed *infra*, §§ 719-20.

¹ In 1859, the following statute was enacted in Massachusetts:—

Burden of Proof on Defendant relying on Written License.—In all criminal prosecutions in which the defendant shall rely for his justification upon any written license, appointment, or certificate of authority, he shall prove the same; and until such proof, the

presumption shall be that he is not so authorized. Supplement to Revised Statutes, 1859, c. 160, p. 625; Gen. Stat. c. 172, § 10. An analogous statute was enacted in 1864. Stat. 1864, p. 79. This act is constitutional. Com. v. Curran, 119 Mass. 206.

"If the defendant was proved to have kept intoxicating liquors for sale, the burden of proving that he had a license or authority so to do was upon him." Gray, C. J., Com. v. Curran, 119 Mass. 206; citing Com. v. Kennedy, 108 Mass. 292; Com. v. Leo, 110 Mass. 414; Com. v. Shea, 115 Mass. 102.

² See Whart. Crim. Law, 8th ed. § 1500; People v. Pease, 27 N. Y. 45; Com. v. Bradford, 9 Met. 268; Beardstown v. Virginia, 76 Ill. 44.

³ Com. v. Locke, 114 Mass. 288.

⁴ Weber, Heffter's ed. 192.

⁵ *Infra*, § 832.

that the execution was regular, and the burden of contesting the execution falls on the party assailing the document.

§ 344. At common law, when a presumption of fact exists against a party, the court may instruct the jury that the burden is on the party to remove the presumption, and that if he does not, then the case must go against him on such point,¹ though in some States this is prohibited by statute,² and in all jurisdictions an erroneous charge in this respect is ground for reversal.³

Court may instruct jury that a presumption of fact makes a *prima facie* case by which they are bound.

It may be, however, here generally noticed that in penal prosecutions of all classes the doctrine just stated, however applicable, is not permitted to interfere with the cardinal principle that the jury must acquit when they have a reasonable doubt of guilt.⁴

¹ Whart. Cr. Pl. & Pr. § 708; Crane v. Morris, 6 Pet. 598; Kelly v. Jackson, 6 Pet. 622; U. S. v. Wiggins, 14 Pet. 334.

² Whart. Cr. Pl. & Pr. § 798.

³ Ibid. § 794.

⁴ In Chaffee v. U. S. 18 Wall. 516, which was an action of debt for a penalty, we find the question of burden of proof, in cases of this class, thus learnedly discussed:—

“It remains to consider the exceptions taken to the charge to the jury. These are sixteen in number, and are directed principally to the error which pervades the whole charge, consisting in the instruction, reiterated in different forms, that, after the government had made out a *prima facie* case against the defendants, if the jury believed the defendants had it in their power to explain the matters appearing against them, and did not do so, all doubt arising upon such *prima facie* case must be resolved against them. As we have stated, the defendants had paid taxes on over six thousand barrels of whiskey, manufactured by them between the dates mentioned in the declaration. Nearly this number

was traced to consignees. By the canal certificates and railroad receipts the government had shown in that case a transportation from Tippecanoe of over two thousand barrels more. It was admitted that no charge was to be made to the defendants for any amount they had on hand in October, 1865, although the declaration charges the possession with the unlawful purpose to have been between February 1, 1865, and September 1, 1866. The defendants endeavored to show that they had on hand at that time between two and three thousand barrels, and for that purpose called in a large number of witnesses, neighbors, and others, who had visited the distillery during that period. The estimates of the amount by these witnesses differed materially, being made from recollection. The defendants were present at the trial, but were not called as witnesses. It was proved that they kept books, consisting of day-books, journals, and ledgers.

“Now the court instructed the jury that it was a rule, without exception, that where a party has proof in his power which, if produced, would ren-

der material facts certain, the law presumes against him if he omits to produce it, and authorizes a jury to resolve all doubts adversely to his defence; that, although the case must be made out against the defendants beyond all reasonable doubt, in this case as well as in criminal cases, yet the course of the defendants may have supplied in the presumptions of law all which this stringent rule demanded. 'In determining, therefore, in the outset,' said the court to the jury, 'whether a case is established by the government, you will dismiss from your minds the perplexing question whether it is so made out beyond all doubt. It need not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if, from the facts, you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here, at this stage, you need say only, is the case so far established as to call for explanation.' . . . 'If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants, for the claim of the government, or any material part of it, you will take up their testimony in view of the principle' stated, that of presuming against a party who fails to produce proofs in his possession. And again, the court instructed the jury that the law presumed that the defendants kept the accounts usual and necessary for the correct understanding of their large business, and an accurate accounting between the partners, and that the books were in existence and accessible to the defendants, unless the contrary were shown, and then said to the jury, 'If you believe the books were kept which contained the facts

necessary to show the real amount of whiskey in the hands of the defendants in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or either of them, could, by their own oath, resolve all doubts on this point; if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule.'

"The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence; and if they did not, they were guilty beyond a reasonable doubt.

"We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. *Doty v. State*, 7 Blackford, 427; *State v. Flye*, 26 Me. 312; *Com. v. McKie*, 1 Gray, 61. The case of *Clifton v. U. S.* in 4 Howard, cited by the court below, was decided upon a statute which cast the burden of proof upon the claimant in seizure cases, after probable cause was shown for the prosecution, and, therefore, has no application. 1 Sts. at Large, 678; *Locke v.*

W. G. 7 Cranch, 339. The instructions set at nought established principles, and justifies the criticism of counsel, that it substantially withdrew from the defendants their constitu-

tional right of trial by jury, and converted what at law was intended for their protection — the right to refuse to testify — into the machinery for their sure destruction." Field, J.

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Witness must first be asked as to such statements, § 483.

Witness cannot be contradicted on matters collateral, § 484.

Witness's answer as to motives may be contradicted, § 485.

His character for truth may be attacked, § 486.

Questions to be limited by time and place, § 487.

Bias may be shown, § 488.

Infamy may be shown to impeach credibility, § 489.

Impeaching witness may be attacked and sustained, § 490.

Impeached witness may be sustained, § 491.

But not by proof of former statements, § 492.

XII. RE-EXAMINATION.

Party may re-examine witness, § 493.

Witness may be recalled, § 494.

Witness may be re-cross-examined, § 495.

XIII. PRIVILEGED COMMUNICATIONS.

Lawyer not permitted to disclose communications of client, § 496.

Not necessary that relationship should be formally instituted, § 497.

Nor is privilege lost by termination of relationship, § 498.

Client cannot be compelled to disclose communications made by him to his lawyer, § 499.

Privilege must be claimed in order to be applied, and may be waived, § 500.

Communications, to be privileged, must be made to party's exclusive adviser, § 501.

Lawyer not privileged as to information received by him extra-professionally, § 502.

Information received out of scope of professional duty not privileged, § 503.

Privilege does not extend to communications in view of breaking the law, § 504.

Communications between party and witnesses privileged, § 505.

Telegraphic communications not privileged, § 506.

Priests not privileged at common law as to confessional, § 507.

Judges cannot be compelled to disclose grounds of judgment, § 509.

Nor jurors as to their deliberations, § 510.

Juror if knowing facts must testify as witness, § 511.

Prosecuting attorney privileged as to confidential matter, § 512.

State secrets are privileged, § 513.

And consultations of legislature and executive, § 514.

Police secrets privileged, § 515.

Medical attendants not privileged, § 516.

No privilege to ties of blood or friendship, § 517.

Parent cannot be examined as to access in cases involving legitimacy, § 518.

I. PROCURING ATTENDANCE.

§ 345. To secure the attendance of a witness in a criminal prosecution, a *subpoena ad testificandum* is issued from the tribunal before whom the case is to be tried.¹ When the witness is required to produce papers, these must ordinarily be specified in the subpoena, which is then styled a *subpoena duces tecum*,² and a sweeping description for fishing purposes will not be sustained.³ The clerk or custodian of public records cannot, indeed, be compelled by subpoena to bring such records, they not being within his power. But it is enough, in other cases, if the papers are in the possession of the witness, though the right to them belongs to other persons. If he possess them, he may be compelled by subpoena to bring them into court. Whether he will be compelled to produce such papers is a matter to be subsequently determined by the court. To sustain an order to this effect, it is necessary that they should be duly designated, — a notice to produce all papers relative to the issue not being enough, — and

¹ Whart. on Ev. § 377.

² Ibid.

³ Infra, § 505.

they must be under the witness's control. A witness neglecting to obey the writ is liable not merely to attachment but to a suit for damages.

§ 346. It is ordinarily sufficient to leave a copy of the substance of a subpoena, which is called a subpoena ticket, with the witness. This, however, must be done personally;¹ and the original writ must be shown to the witness at the time the copy or the ticket is left with him.² Any substantial variance between the ticket and the subpoena precludes the summoning party from obtaining an attachment.³

§ 347. The costs and charges of a witness are settled in many States by statute. In England the common law courts have adopted a graduated scale, suitable to the sacrifices of time made by witnesses in obeying the summons.⁴ And even without a special statute, where foreign witnesses, or witnesses in any way out of the jurisdiction of the court, are brought in, proper allowances to them will be sustained by the court as part of the taxable costs. This has been held proper in cases where witnesses have been detained in the country, at great inconvenience to themselves, but great benefit to public justice, in order to give evidence on trial. Extraordinary causes, also, it has been held, justify extraordinary costs, and in several important prosecutions large sums have recently (1879) been paid in several States to obtain proper expert testimony.⁵ Even a party's fees as a witness may, under peculiar circumstances, be allowed.⁶

Subpoena
must be
served per-
sonally.

Fees allow-
able to
witnesses.

¹ Pyne, in re, 1 Dow. & L. 703; Doe v. Andrews, 2 Cow. 846.

² Garden v. Creswell, 2 M. & W. 319; Wadsworth v. Marshall, 1 C. & M. 87; Marshall v. R. R. 11 C. B. 398.

³ Chapman v. Davis, 4 Scott N. R. 319; S. C., 3 M. & Gr. 609; Doe v. Thomson, 9 Dowl. 948.

⁴ See Taylor on Evidence, § 1126.

⁵ Grave exception may be taken to the practice existing in some States, of paying for expert testimony for the prosecution, and refusing to pay

for it when offered for the defence. Experts have been paid large sums for their services when testifying for the prosecution, and in this way the ablest experts, holding the view called for, have been obtained; while the defence has been obliged to confine itself to such witnesses as it can afford specially to pay, and in most cases, from want of means, to accept the services of mere volunteers sometimes without experience, sometimes without common sense. Good defences, in this way, have been

⁶ See authorities for this section cited in Whart. on Ev. § 380.

§ 348. In civil cases, as is elsewhere seen,¹ an attachment will not issue to compel attendance unless the reasonable expenses of the witness, as such expenses are legally defined, have been paid, or at least tendered to him in advance of trial.² It is otherwise in prosecutions for felonies.

In felonies
expenses
need not be
prepaid.

wrecked, and bad prosecutions established; and not only grievous wrong has been thus done to the defendant, but a shock given to the public sense of justice. The way to avoid such catastrophes is, if special fees are to be given to experts, to give them to all experts whom the court should judge it proper specially to employ and remunerate.

¹ Whart. on Ev. § 381.

² "In England," to adopt Mr. Roscoe's exposition (Roscoe's Crim. Ev. 8th ed. § 110), "where a subpoena is served on a person in one part of the United Kingdom for his appearance in another, under the 45 Geo. 3, c. 92, it is provided that the witness shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpoena, for defraying the expenses of coming, attending, and returning. In this case, therefore, in order that the subpoena may be effectual, the expenses must be tendered. But this only applies to a witness brought from one great division of the United Kingdom, as England or Ireland, to another. It has, indeed, been doubted whether in other criminal cases a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a subpoena, and the doubt is founded upon the provision of the above statute. 1 Chitty Cr. Law, 613. The better opinion, however, seems to be, and it is so laid down in books of authority, that witnesses making default on the trial of criminal prosecutions (whether felonies or misdemeanors) are not ex-

empted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpoena, although the court would have good reason to excuse them for not obeying the summons, if, in fact, they had not the means of defraying the necessary expenses of the journey. 2 Phill. Ev. 383, 9th ed.; 2 Russ. by Greaves, 947. 'It is,' says Mr. Starkie, 'the common practice in criminal cases, for the court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid.' 1 Ev. 83 (a), 2d ed. And, accordingly, at the York Summer Assizes, 1820, Bayley, J., ruled, that an unwilling witness, who required to be paid before he gave evidence, had no right to demand such payment. His lordship said, 'I fear I have not the power to order you your expenses;' and on asking the Bar if any one recollected an instance in point, Scarlett answered, 'It is not done in criminal cases.' 1 Anon. Cht. Burn, 1001; 2 Russ. by Greaves, 948 (a). So on the trial of an indictment which had been removed into the Queen's Bench by *certiorari*, a witness for the defendant stated, before he was examined, that at the time he was served with the subpoena no money was paid him, and asked the judge to order the defendant to pay his expenses before he was examined. Park, J., having conferred with Garrow, B., said, 'We are of opinion that I have no authority in a criminal case to order a defendant to pay a witness his expenses, though he has been subpoenaed by

§ 349. To sustain an attachment¹ it must appear that the summons was regularly served, with due time to prepare for attendance. Due service also requires, as we have seen, that the writ should be exhibited to the witness, and either a copy, or a ticket giving its substance, left with him. It has been said that it is essential, in order to obtain an attachment, to prove that the witness wilfully refused to attend. But wilfulness is to be assumed from the very fact of non-attendance after summons; and ordinarily it is enough, in criminal cases, for a party to prove such summons, in order to obtain a rule to show cause why an attachment should not issue. If otherwise, there would be no way of bringing negligent witnesses into court. If the testimony of the witness, however, is immaterial, and there be no contempt shown, the attachment may be refused.²

Witnesses
refusing to
attend are
in con-
tempt.

§ 350. The English practice is for the summoning party to apply first for a rule to show cause, which is granted on *ex parte* proof. Yet where the delay incident on such a rule would be pernicious to the case of the summoning party, the rule, if not dispensed with, may be shaped in such a way as to secure almost immediate attendance; and in many jurisdictions in this country the attachment issues without a rule, on proof of service and of refusal to attend. If it appears upon a rule to show cause that the witness is too ill to attend, or is in any other way incapacitated,³ or has been led to believe that his attendance was not really required,⁴ the rule will be discharged. But in other cases it will be granted at the

Attach-
ment
granted on
rule to
show
cause.

such defendant; nor is the case altered by the indictment being removed by *certiorari*, and coming here as a civil cause.' *R. v. Cooke*, 1 C. & P. 321. In *R. v. Cozen*, Glouc. Spr. Ass. 1843, 2 Russ. by Greaves, 948 (a), Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpoena duces tecum*, to go before the grand jury, although he objected, on the ground that his expenses had not been paid. But the court might refuse to grant an attachment in the

case of a poor witness, if his expenses were not paid."

In New York the same rule is applied to felonies, but not to misdemeanors. *Andrews v. Andrews*, 2 Johns. Cas. 109; *Chamberlain's case*, 4 Cow. 49.

¹ As to practice in contempt see Whart. Crim. Pl. & Pr. § 954.

² Whart. on Ev. § 383.

³ *State v. Benjamin*, 7 La. An. 47.

⁴ *R. v. Sloman*, 7 Dowl. 693; *State v. Nixon*, Wright (Ohio), 763; *Beaulieu v. Parsons*, 2 Minn. 37.

discretion of the court, upon due proof of service, and of its disregard.¹ An attachment may be granted even though the jury is not sworn;² though the witness's name be not called,³ and though the case be not reached.⁴ But there should be an affidavit that the witness is material.⁵

§ 351. The attendance of a witness in prison may be secured by a *habeas corpus ad testificandum*.⁶ To this writ it is ordinarily a prerequisite that the party desiring the attendance of the witness should make affidavit before a judge at chambers that the witness in question is material to the case, but is in custody, whether on criminal or civil process.⁷ A party to the record, who is entitled to testify in the case, if he be in prison, is entitled to use this writ in order that he himself may be brought into court.⁸ The same writ has been issued to secure the presence in court of a person confined as a lunatic.⁹

§ 352. Where there is ground to suspect that a material witness may abscond or secrete himself before trial, he may, on due ground laid, be held to bail to appear at the trial, and may be committed on failure to procure bail.¹⁰ Such imprisonment does not violate the sanctions of the federal or state constitutions.¹¹

¹ Judson, ex parte, 3 Blatch. 89; Stephens v. People, 19 N. Y. 549; State v. Trumbull, 1 South. 139; West v. State, 1 Wis. 209. See more fully Whart. Crim. Pl. & Pr. §§ 967-68; Whart. on Ev. § 383.

² Mullet v. Hunt, 1 Cr. & M. 752.

³ R. v. Stretch, 5 A. & E. 508; Dixon v. Lee, 5 Tyrw. 180.

⁴ Barrow v. Humphreys, 3 B. & A. 598.

⁵ Tinley v. Porter, 2 M. & W. 822.

⁶ See R. v. Roddam, Cowp. 672; State v. Kennedy, 20 Iowa, 569.

⁷ Chitty, Forms, 60; Marsden v. Overbury, 18 C. B. 34; Gordon's case, 2 M. & S. 580; Browne v. Gisborne, 2 Dowl. N. S. 263; Graham v. Glover, 5 E. & B. 591.

⁸ Cobbett, ex parte, 4 Jur. N. S. 145.

⁹ Fennell v. Tait, 1 C., M. & R. 584.

¹⁰ Evans v. Rees, 12 Ad. & El. 55; Ashton's case, 7 Q. B. 169; U. S. v. Butler, 1 Cranch C. C. 422; State v. Zellers, 2 Halst. 220. See, however, Bickley v. Com. 2 J. J. Marsh. 572, where it is said that the court cannot compel the witness to give surety.

¹¹ "The power to bind witnesses by recognizance to appear and give evidence was originally given by the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10. It was further extended by the 7 Geo. 4, c. 64, which repealed the prior statutes; and is now regulated by the 11 & 12 Vict. c. 42, s. 20, by

¹¹ State v. Grace, 18 Minn. 398.

II. OATH AND ITS INCIDENTS.

§ 353. An oath is the assurance of the truth of an assertion by an appeal to a superior sanction. Mr. Best¹ gives a narrower definition, holding that “an oath is an application of the religious sanction;” and that it is “calling the Deity to witness in aid of a declaration by man.” To this effect he quotes Lord Coke,² and Bonnier,³ who declares “Le serment est l’attestation de la Divinité à l’appui d’une déclaration de l’homme.” Yet if we are now to regard an affirmation as equivalent, when given under the same sanction, to an oath, and if we accept the rulings which permit atheists to testify under affirmation, we must extend the definition to cases where the witness appeals to his own sense of right as a voucher. But in any view, an appeal of this class solemnly made, apart from the fact that falsehood, uttered after such an appeal, is

which power is given in all cases, whether of felony or misdemeanor, to bind by recognizance the prosecutor and witnesses to appear and give evidence at the next court of oyer and terminer and general jail delivery, or the next court of quarter sessions, as the case may be. The same power is exercised by coroners under the 7 Geo. 4, c. 64, s. 4, in cases of murder and manslaughter. So also witnesses for the defence may now be bound over to appear. See 30 & 31 Vict. c. 35, s. 3, incorporated with the 11 & 12 Vict. c. 42.

“When a trial is postponed, the presiding judge, exercising the ordinary functions of a justice of the peace, usually binds over the prosecutor and witnesses to appear and give evidence at the next assizes or the next quarter sessions, as the case may be.

“If a witness, on his examination before a magistrate, refuse to be bound over, he may, by the express provisions of the 11 & 12 Vict. c. 42, s. 20, be committed. It seems doubtful whether, in any case, a witness can

be compelled to find sureties for his or her appearance. Per Graham, B., Bodmin Summ. Ass. 1827; 2 Stark. Ev. 82, 2d ed.; per Lord Denman, *Evans v. Rees*, 2 A. & E. 59. It was once thought that an infant was bound to find sureties in such a case, and could be committed in default, on the ground that his own recognizance would be invalid; but it has been since held that infancy is no ground for discharging a forfeited recognizance to appear at the assizes and prosecute for felony. *Ex parte Williams*, 13 Price, 670. It is still the practice generally not to take the recognizance of a married woman, but that of her husband, or some person willing to be bound for her, if any such there be; but if no such person be at hand, she herself is frequently bound; and there seems no reason why her recognizance should not be binding.” Roscoe’s Cr. Ev. 8th ed. 106.

¹ Evidence, § 57.

² 3 Inst. 165.

³ *Traité des Preuves*, § 340.

indictable as perjury, gives an assurance, amounting to *prima facie* proof, that the assertion made by the witness corresponds with his consciousness of right and truth: “Est enim jusjurandum affirmatio religiosa.”¹ It is final, so far as the case is concerned, for an oath is administered to a witness but once in a cause, no matter how often he may be recalled.²

§ 354. While the common and regular way of swearing by a Christian is on the four evangelists, or on the New Testament,³ the general rule is that witnesses are to be sworn after a form the obligation of which they acknowledge: A Jew, for instance, may be sworn on the Pentateuch or Old Testament, with his head covered;⁴ a Mahometan, on the Koran;⁵ a Gentoo, touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest;⁶ a Chinese, by breaking a china saucer;⁷ a Scotch Covenanter, or member of the kirk, by holding up the hand without kissing the book.⁸ But if a witness declares that he acknowledges the sanction of the oath in the usual form, it is not usual to address to him further questions. It is true that in whatever form he consents to be sworn, *e. g.* if though a Christian he declines to be sworn on the New but consents to be sworn on the Old Testament,⁹

¹ L. 5. pr. § 1. 3; De jur. xii. 2. See Com. v. Winnemore, 2 Brewst. 378; Savigny, *ut supra*; Whart. on Ev. § 386. Compare Mr. Livingston's remarks, Livingston's Works, ed. of 1873, i. 398.

² Bulloch v. Koon, 3 Cow. 30.

³ See, per Lee, C. S., R. v. Bosworth, Str. 1114. The adjuration oath was “on the true faith of a Christian,” till altered for the Jews by 10 Geo. 1, c. 10. The swearing on a common prayer-book, with the four gospels in the same cover, will suffice in order to an indictment for perjury. Rokeby v. Langston, 2 Keb. 314. See McAdams v. Weaver, 2 Kerr (N. B.), 176.

⁴ Gomez Serra v. Munoz, Stra. 821. See Stra. 1118.

⁵ R. v. Morgan, 1 Leach, 54.

⁶ Omichund v. Barker, Wil. 545.

⁷ R. v. Entrehman, 1 C. & M. 248.

In this country a Chinaman who stated that he did not know the name of the book he was sworn on, but that he believed that if he should state anything untrue the court would punish, and that after his death, he would “go down there,” making an emphatic gesture downward with his hand, was held to be a competent witness. The Merrimac, 1 Ben. 490; and see generally Fuller v. Fuller, 17 Cal. 605.

⁸ R. v. Mildrone, Leach, 412; R. v. Walker, 2 Sid. 6, cited Cowp. 390; Mee v. Reid, Peake, 23; 1 Leach, 498.

⁹ Edmonds v. Rowe, R. & M. 77.

he may be afterwards asked whether he holds such oath binding on his conscience; but he cannot be asked whether he considers any other form of oath more binding.¹ The fact that a witness permits himself, without objection on his part, to be sworn by an oath he does not deem binding, does not relieve him from a prosecution for perjury, if his testimony be wilfully false.²

§ 355. By statutes now adopted in all jurisdictions in this country, persons who are conscientiously opposed to taking an oath may testify under the form of a solemn affirmation. If false testimony be given under an affirmation, the witness is as much exposed to a prosecution for perjury as if he had been formally sworn.³ But the right to be affirmed, in those States which make conscientious objection the test, cannot be granted to a witness who has no conscientious objection to an oath.⁴

Affirmation may be substituted for oath.

III. PRIVILEGE FROM ARREST.

§ 356. A witness, when on attendance on a court of justice, is not protected from arrest on a criminal prosecution,⁵ no matter how surreptitious and improper may have been the process by which he was brought within the range of the arrest.⁶ From arrest on civil process a witness is protected, not only while in attendance on the court, but when going to and returning from it; in other words, *eundo, morando, et redeundo*. The rule is the same whether the witness attends voluntarily or on compulsion, and whether the tribunal he attends be a court and jury, or a commissioner or other officer authorized to take testimony.⁷ And it is held in New York that a witness from another State is privileged from even a summons.⁸

Witness not privileged from criminal arrest but otherwise as to civil.

¹ Sells v. Hoare, 3 B. & B. 232.

² See U. S. v. Coolidge, 2 Gall.

³ Sells v. Hoare, 3 B. & B. 232; S. C., 7 Moore, 36; State v. Keene, 26 Me. 33; Com. v. Knight, 12 Mass. 274; Campbell v. People, 8 Wend. 636; Thomas v. Com. 2 Rob. 795; State v. Witherow, 3 Murph. 153; McKinney v. People, 7 Ill. 540. See Whart. Crim. Law, 8th ed. § 1251.

364; Whart. Crim. Law, 8th ed. § 1251.

⁴ Williamson v. Carroll, 16 N. J. L. 217.

⁵ Douglass, in re, 3 Q. B. 837.

⁶ Whart. Crim. Pl. & Pr. § 27.

⁷ Whart. on Ev. § 389.

⁸ Person v. Greer, 66 N. Y. 124.

IV. WHO ARE COMPETENT WITNESSES.

§ 357. While credibility is for the jury, under the instructions of the court, competency is exclusively for the court. Whatever may be the objection to the competency of a witness, whether interest, insanity, infancy, or public policy, if it goes to incompetency for the purpose for which the witness is called, it must be determined by the court. Ordinarily, as we will presently see, the objection must be taken, when known, before the witness is sworn. In order to substantiate the objection, the witness, as we will further see, may be examined, according to the old practice, on the *voir dire*; or being sworn in chief, his examination may be arrested by interrogatories from the opposite party, as to his competency.¹ But by the court must the objection, whenever it is made, be determined.²

§ 358. The law, on grounds of policy, presumes that all witnesses tendered in a court of justice are not only competent but credible. If a witness is incompetent, this must be shown by the party objecting to him; if he is not credible, this must be shown, either from his examination, or by impeaching evidence *aliunde*. Hence, so far as competency is concerned, if the evidence is in equipoise, the witness should be admitted.³

§ 359. A party who knows objections to the competency of a witness cannot, so it has been held, hold back such objections until the witness has been examined, and then raise the objections if the witness's testimony prove unfavorable. But it is otherwise when the objecting party is not aware of the full force of the objection until the examination has begun.⁴ The objection, however, if

¹ Whart. on Ev. § 492.

Scanlan, 58 Mo. 204; and other cases

² See cases cited *infra*; and see R. v. Perkins, 2 Mood. C. C. 135; State v. Whittier, 21 Me. 341; Dole v. Thurlow, 12 Met. 157; Com. v. Burke, 16 Gray, 33; Cook v. Mix, 11 Conn. 432; Com. v. Lattin, 29 Conn. 389; Perry's case, 3 Grat. 632; Peterson v. State, 47 Ga. 524; State v.

cited Whart. on Ev. § 2.

³ Whart. on Ev. § 392.

⁴ See R. v. Whitehead, L. R. 1 C. C. 33; S. C., 10 Cox, 234; Vaughan v. Worrall, 2 Madd. 322; Selway v. Chappell, 12 Sim. 113; State v. Damery, 48 Me. 327; Shurtleff v. Willard, 19 Pick. 202; Andre v. Bodman, 13

discovered during the examination in chief, must be made before cross-examination.¹ When a witness, after verdict, is discovered to have been incompetent, and this without any laches on the part of the objecting party, a new trial may be granted, if the evidence of the witness was material, or if the party offering this evidence is tainted with suspicion of impropriety in concealing the incompetency.² But where the objection could have been taken during the trial a new trial will be refused, nor can the objection be noticed on error.³

§ 360. If a witness speaks of something perceived by himself, and not through the medium of a third party, his testimony cannot be excluded because at the time of perception his attention was not given closely to the thing perceived, or because his powers of perception were feeble, or because his attention at the time was distracted. He may have an impression of what took place, which, from the nature of things is far fainter than that of a witness not called, but he is not on this ground to be excluded. Disabilities of this kind go not to competency but to credibility.⁴ A witness, no matter how reliable, cannot be permitted to give the contents of a written instrument that could be produced; but no witness, no matter how unreliable, can be excluded because another more authoritative is not called.⁵ A witness who has heard a party or his agent say certain things can be received, though the party or agent himself might have been examined, but is not;⁶ and hence the admissions of a party can be proved, though the party himself is in court to be examined as to such admissions.⁷ And as we have already seen, a person not an expert may be admitted to state facts as to which an expert could be procured who would speak much more authoritatively;⁸ and a party cognizant with

Distinction between secondary and primary does not apply to witnesses.

Md. 241; *Veiths v. Hagge*, 8 Iowa, 163. See *Com. v. Green*, 17 Mass. 515; *Howser v. Com.* 51 Penn. St. 332.

¹ *Sheridan v. Medara*, 10 N. J. Eq. 469; *Brooks v. Crosby*, 22 Cal. 42.

² Whart. Crim. Pl. & Pr. §§ 876-81; *Wade v. Simeon*, 2 C. B. 342.

³ Ibid.

⁴ *Infra*, § 373.

⁵ See *supra*, § 174; *Governor v. Roberts*, 2 Hawks, 26; *Green v. Cawthorn*, 4 Dev. 409; *State v. Cain*, 9 W. Va. 559.

⁶ *Badger v. Story*, 16 N. H. 168; *Featherman v. Miller*, 45 Penn. St. 96. *Infra*, §§ 623 *et seq.*

⁷ *Infra*, § 685; Whart. on Ev. §§ 1094, 1175 *et seq.*

⁸ *Supra*, § 160.

another's writing may be called to state his knowledge as well as the writer himself.¹

§ 361. By the English common law, the oath is an essential prerequisite to the admission of a witness to testify. *In judicio non creditur nisi juratis.*² In the leading case on this topic³ the question came up on the admissibility in evidence of depositions which had been made on oath by some Gentoos before a chancery commission in the East Indies. It had been thought up to that time, on the authority of Coke,⁴ that none but Christians were competent witnesses. He laid it down that "an infidel cannot be a witness;" and it was clear that, under the designation of infidel, he classified all who were not Christians. But Willes, C. J., ruled that Lord Coke's proposition was "without foundation, either in Scripture, reason, or law;" and proceeded to declare, in an opinion which has not since been questioned, that "Such infidels who believe in God, and that He will punish them if they swear falsely (in some cases and under some circumstances), may and ought to be admitted as witnesses in this, though a Christian country." And, "Such infidels, if any such there be, who either do not believe in God, or, if they do, do not think that He will either reward or punish them in this world or in the next, cannot be witnesses under any case or under any circumstances, for the plain reason, because an oath cannot possibly be any tie or obligation upon them."⁵ It may therefore be regarded as settled that by the English common law an atheist is inadmissible as a witness, independently of the statutes permitting affirmations to be substituted for oaths;⁶ though it is sufficient for admissibility, that the witness proposed believes in a Supreme Being who dispenses retribution in this life alone.⁷ By statute, however, in several jurisdictions, religious unbelief no

¹ *Infra*, § 549.

² 2 Salk. 512; 1 Bl. Com. 402.

³ *Omichund v. Barker*, Willes, 538; 1 Sm. L. C. 194.

⁴ Co. Litt. 6 b.

⁵ See *Maden v. Catanach*, 7 H. & N. 360; 31 L. J. Ex. 118.

⁶ *Maden v. Catanach*, 7 H. & N. 360; *Smith v. Coffin*, 18 Me. 157;

Norton v. Ladd, 4 N. H. 444; *Arnold v. Arnold*, 18 Vt. 363; *Thurston v. Whitney*, 2 Cush. 104; *Beardsly v. Foot*, 2 Root, 399; *Atwood v. Welton*, 7 Conn. 66; *People v. McGarren*, 17 Wend. 460; *Anderson v. Maberry*, 2 Heisk. 653. Otherwise, when an affirmation is permitted. *Supra*, § 353.

⁷ Whart. on Ev. § 395.

longer disqualifies ; nor at common law can defect in such belief be a ground of exclusion in jurisdictions which permit the substitution of an affirmation for an oath.¹

§ 362. The burden of proving religious unbelief in a person tendered as a witness is on the party making the objection.² It is competent, under such a rule, at any time before the witness is sworn, to introduce testimony to show his defect in this relation.³ Whether he can himself be examined on his *voir dire* as to his religious belief has been doubted. If examined, he must be examined without the prior tendering of an oath,⁴ for it is a *petitio principii* to swear a person in order to determine whether he can be sworn.⁵ Even

Evidence
may be
taken as to
religious
belief.

¹ Supra, § 358. Com. v. Burke, 16 Gray, 33; Perry's case, 3 Grat. 632; People v. Jenness, 5 Mich. 305; Fuller v. Fuller, 17 Cal. 605; Ake v. State, 6 Tex. Ap. 398.

The following summary of the older cases may be still not without value: In Pennsylvania, it was directly decided that the true test of the competency of a witness, on the ground of his religious principles, is, whether he believes in the existence of a God who will punish him if he swear falsely. Cubbison v. M'Creary, 2 W. & S. 262. See Com. v. Winnemore, 2 Brewster, 378; Blair v. Seaver, 26 Penn. St. 274. Hence those are competent who believe future punishment not to be eternal. Cubbison v. M'Creary, 2 W. & Serg. 262. See Butts v. Swartwood, 2 Cowen, 431; Blocker v. Burness, 2 Ala. 354; U. S. v. Kennedy, 3 McLean, 175. In Ohio, it is held that a witness's belief that punishments for false swearing are inflicted in this life only might go to his credibility. U. S. v. Kennedy, 3 McLean, 175. In Connecticut, it was formerly decided that those who believe in a God, and in rewards and punishments only in this world, are not competent witnesses. Atwood v. Welton, 7 Conn. R. 66. The legislature

of that State has since enacted that such persons shall be received as witnesses. In Massachusetts, it has been said that mere disbelief in a future existence goes only to the credibility. Hunscom v. Hunscom, 15 Mass. 184. In Maine, a belief in the existence of the Supreme Being is rendered sufficient, without any reference to rewards or punishments. Stat. 1833, c. 68; Smith v. Coffin, 6 Shep. 157. In South Carolina, a belief in God and his providence has been held sufficient. Jones v. Harris, 1 Strob. 160. In Illinois, it has been said that a person who has no religious belief, nor belief in a Supreme Being, and who, though recognizing his amenability to human law in case he testifies falsely, has no sense of moral accountability, is inadmissible. Central Mil. R. R. v. Rockafellow, 17 Ill. 541.

² Donnelly v. State, 26 N. J. L. 463.

³ Anderson v. Maberry, 2 Heisk. 653. See infra, § 475.

⁴ See R. v. White, 1 Leach, 430; Maden v. Catanach, 7 H. & N. 360; R. v. Serva, 2 C. & K. 56; Scott v. Hooper, 14 Vt. 535; Harrel v. State, 1 Head, 125.

⁵ Queen's case, 2 B. & B. 284; U. S. v. White, 5 Cranch C. C. 38; Wake-

when this objection does not apply, as where the objection goes not to competency but to credibility, a witness cannot be compelled to answer as to special phases of his creed.¹ When the question is competency, the proper course, in order to prove such defect in religious belief as argues a deficiency in a sense of moral accountability, is to put in evidence the witness's own declarations.² And it is held that his declarations, exhibiting a change of opinion, may be shown by those to whom such declarations were uttered.³ If, on cross-examination, it appears that the witness has not the moral sense requisite to make him a competent witness, the court, at its discretion, may strike out his testimony, or leave it to the jury with proper instructions as to its weight.⁴

§ 363. At common law, persons convicted of crimes which render them infamous are excluded from being witnesses. "In-

field v. Ross, 5 Mason, 19; Smith v. Coffin, 6 Shepley, 157; Com. v. Smith, 2 Gray, 516; Com. v. Burke, 16 Gray, 33; Jackson v. Gridley, 18 Johns. 98; Com. v. Winnemore, 1 Brewst. 356; State v. Townsend, 2 Harring. 543. See Odell v. Koppee, 5 Heisk. 88.

¹ Donkle v. Kohn, 44 Ga. 266. See *infra*, § 475.

"It has sometimes been allowed to counsel," says Mr. Justice Talfourd, "to question witnesses on their *voir dire* as to their religious belief; but it may be doubted whether a witness would not be justified in insisting, when so questioned, on the simple answer that he considers the oath administered in the usual form binding on his own conscience, and in declining to answer further; for a confession thus forced from him, of a disbelief in a state of retribution, would certainly be esteemed disgraceful in a court of justice, and there seems no reason why a person should thus be taxed, perhaps to his own infinite prejudice, merely because he appears to perform a public duty in obedience to a subpoena. At all events, it is quite clear

that a witness may properly refuse to answer any questions which go beyond an inquiry into his belief in a Superior Being to whom man is answerable; and that it is the duty of counsel to refuse, however urged, to put such questions, which are altogether impertinent and vexatious." 6 Dick. Q. S. 535.

² Wakefield v. Ross, 5 Mason, 19; Central Mil. R. R. v. Rockafellow, 17 Ill. 541; Curtiss v. Strong, 4 Day, 51; Jackson v. Gridley, 18 Johns. 98.

³ U. S. v. White, 5 Cranch C. C. 38; Smith v. Coffin, 6 Shepley, 157; Com. v. Wyman, Thach. C. C. 432; Atwood v. Welton, 7 Conn. 66; Jackson v. Gridley, 18 Johns. 98; State v. Townsend, 2 Harring. 543; Com. v. Bachelor, 4 Am. Jur. 79.

⁴ People v. Harper, 1 Edm. (N. Y.) Sel. Cas. 180.

When the question is credibility, it is for the jury to determine what weight is to be given to the testimony of one whose immoral and degraded life shows a want of religious sentiment, or a disregard to personal character or reputation. Bowman v. Smith, 1 Strobb. 246. See *infra*, § 384.

famous" crime, in this sense, is regarded as comprehending treason, felony, and the *crimen falsi*.¹ In many jurisdictions, however, the disqualification of infamy is removed by statute, though a conviction may be proved to affect credibility.²

Infamy incapacitates at common law.

¹ Phil. & Am. on Ev. p. 17; 6 Com. Dig. 353, Testm. A. 4, 5; Co. Litt. 6 b; 2 Hale P. C. 277; 1 Stark. Evid. 94, 95; 1 Greenl. on Ev. §§ 372, 373. See Mr. Livingston's criticism, Livingston's Works, i. 468. And see cases in subsequent notes.

² Com. v. Gorham, 99 Mass. 420. In Massachusetts, see Suppl. Rev. Stat. 607, 803; in New York, see Donahue v. People, 66 N. Y. 208; in Michigan, see Dickinson v. Dustin, 21 Mich. 561; in Ohio, Brown v. State, 18 Oh. St. 496; in Georgia, Frain v. State, 40 Ga. 529; in Indiana, Glenn v. Cove, 42 Ind. 60. See for other cases *infra*, § 489. See, as to impeaching witnesses in this way, *infra*, § 489. In New York, however, as late as 1869, all convictions of offences punishable by death or imprisonment in the state prison made the convict incompetent as a witness. See, as applying this provision, People v. Park, 41 N. Y. 21; *aff. S. C.*, 1 Lans. 263.

As there are still States which retain the disqualification of infamy, and as in several States convictions of infamous offences can be introduced to impeach credibility, it may be proper to append, in this place, a summary of the rulings as to infamy.

A witness is rendered infamous by a conviction in the courts of his own country of forgery; *R. v. Davis*, 5 Mod. 74; *Poage v. State*, 3 Oh. St. 229; perjury; *Greenl. Ev.* § 673; *R. v. Teal*, 11 East, 307; subornation of perjury; *Co. Lit.* 6 b; 6 Com. Dig. 353, Testm. A. 5; *Sawyer's case*, 2 Hale P. C. 141; suppression

of testimony by bribery, conspiracy to procure the absence of a witness; *Clancy's case*, Fortesc. R. 208; *Bushell v. Barratt*, R. & M. 484; conspiracy to accuse another of crime; 2 Hale P. C. 277; 6 Hawk. P. C. c. 46, s. 101; *Co. Lit.* 6 b; *R. v. Priddle*, 1 Leach C. C. 442; *Crowther v. Hopwood*, 3 Stark. 21; 1 Stark. Evid. 95; *Ville de Varsovie*, 2 Dods. 191; and barratry; *R. v. Ford*, 2 Salk. 690; *Bull. N. P.* 292. But it is said not to be so with the mere attempt to procure the absence of a witness. *State v. Keyes*, 8 Vt. 57.

It is the infamy of the crime, and not the nature or mode of the punishment, that destroys competency; *Gilb. Evid.* 140; *Com. v. Shaver*, 3 W. & S. 338; *Schuylkill v. Copley*, 67 Penn. St. 386; and, therefore, though a man had stood in the pillory for a libel, or for seditious words, or the like, he was not thereby disabled from being a witness. *Gilb. Evid.* 140, 141; 3 Lev. 426. Outlawry in a civil suit does not render a man incompetent as a witness; *Co. Lit.* 6 b; 2 Hawk. c. 46, s. 21; nor has the mere commission of any offence that effect, unless the party has been actually convicted of it. *Kel.* 17, 18; 1 Sid. 51; *Cowp.* 3. See 11 East, 309.

In Pennsylvania, a person convicted of arson in the night-time of buildings or board yards in any city or incorporated district is incompetent to testify. Act April 16, 1849, Pamph. L. 664.

A conviction of grand or petit larceny disqualifies. *Pendock v. Mackinder*, Willes, 665; *Com. v. Keith*, 8 Met. 531; *State v. Gardner*, 1 Root,

§ 364. Where, even at common law, a convict is a party, he may, in order that he may not be wholly remediless, make an affidavit necessary to his exculpation or defence, or for relief against an irregular judgment, or the like;¹ but it is said that his affidavit cannot be

Excepted
cases
where con-
vict may
testify.

485; *Lyford v. Farrar*, 11 Foster, 314. In New York, however, the latter has been ruled to go only to the credibility of a witness. *Carpenter v. Nixon*, 5 Hill, 260.

If a statute declare the perpetrator of a crime "infamous," this, it seems, renders him incompetent to testify. 1 Phil. Evid. p. 18; 1 Gilb. Evid. by Lofft, 256, 257.

In Massachusetts, it was said at common law that a person convicted of the offence of receiving stolen goods, knowing them to have been stolen, is not a competent witness. *Com. v. Rogers*, 7 Met. 500. In Pennsylvania, however, the contrary doctrine has been advanced by a learned judge. *Com. v. Murphy*, 5 Penn. Law J. 290.

No disqualification, it was said by Judge Washington, attends a conviction of assault and battery with intent to kill; *U. S. v. Brockius*, 3 Wash. C. C. 99; nor, it was ruled by the Supreme Court of Pennsylvania, the conviction of a sheriff of the offence of bribing a voter previous to his election to the office. *Com. v. Shaver*, 3 W. & S. 338.

A conviction of the offence of obtaining goods by false pretences does not render the party an incompetent witness; *Utley v. Merrick*, 11 Met. 302; nor does a conviction for obstructing the passage of cars on a railroad; *Com. v. Dame*, 8 Cush. 384; nor for being a common prostitute; *State v. Randolph*, 24 Conn. 363; nor

for keeping a gaming or bawdy-house; *R. v. Grant*, 1 R. & M. 270; *Deer v. State*, 14 Mo. 348; *Bickel v. Fasig*, 33 Penn. St. 463; nor for cutting timber; *Holler v. Ffirth*, Penning. 531; nor for conspiracy to defraud by spreading false news or otherwise; 1 Greenl. Ev. § 373; though the last point has been ruled differently by the United States Circuit Court in the District of Columbia. *U. S. v. Porter*, 2 Cranch C. C. 60.

Conviction of playing faro does not bring incompetency. *Holloway v. Com.* 11 Bush, 344.

Foreign Convictions. — How far a foreign judgment of an infamous offence disables a witness has been the subject of much conflict of authority. In Massachusetts, it has been determined that such conviction does not attach disability; and, after an argument of remarkable learning and vigor, the court came to the conclusion that it was not bound to respect the criminal judgments of the courts, either of neighboring States or of a foreign country, though the record is admissible to discredit. *Com. v. Green*, 17 Mass. 515, 540. See also *Campbell v. State*, 23 Ala. 44. Such seems also to be the opinion of the late Mr. Justice Story; *Conf. of Laws*, §§ 91-93, 104, 620, 625; and of Mr. Greenleaf; 1 Greenl. on Ev. § 376. See also *State v. Ridgely*, 2 Har. & M'Hen. 120; *Clarke's Lessee v. Hall*, *Ibid.* 378; *Cole's Lessee v. Cole*, 1 Har. & J. 572. The force of

¹ *Davis and Carter's case*, 2 Salk. 461; *R. v. Gardiner*, 2 Burr. 1117; *Atcheson v. Everitt*, Cowp. 382; *Skiner v. Perot*, 1 Ashm. 57.

read to support a criminal charge.¹ But the same principle which makes a wife admissible against her husband, in cases of violence committed on herself, would render a convict competent to obtain redress for personal injury, when no other evidence could be obtained.

§ 365. Disability by infamy may be removed by the production of a pardon under the great seal.²

When the person thus rehabilitated is an accomplice, his testimony is subject to the distinctions hereafter stated in respect to corroboration.³

Disability
from in-
famy re-
moved by
pardon.

the three last cited cases, however, is much weakened by the fact that in them the rejected witnesses were persons sentenced in England for felony, and transported as such to Maryland before the Revolution. In New York a foreign conviction does not disqualify; *Sims v. Sims*, 75 N. Y. 466 (see *infra*, §§ 489, 596 a). In Virginia; *Uhl v. Com.* 6 Grat. 706; and Alabama; *Campbell v. State*, 23 Ala. 44, the record is rejected altogether. The contrary opinion was held in North Carolina, after an elaborate examination. *State v. Candler*, 3 Hawks, 393. In New Hampshire, a conviction in another State of a crime which by the laws of such State disqualifies the party from being heard as a witness, and which, if committed in New Hampshire, would have operated as a disqualification, is sufficient to exclude the party from being a witness. *Chase v. Blodgett*, 10 N. H. 22. See *Hoffman v. Coster*, 2 Whart. 453; *U. S. v. Wilson*, Baldw. 90; *Jackson v. Rose*, 2 Va. Cas. 34. Compare *Com. v. Hanlon*, 3 Brewst. 461; *Kirschner v. State*, 9 Wis. 140; Whart. Conf. of L. §§ 107, 769. See *infra*, § 596 a.

Verdict without Judgment. — Conviction, without judgment, works no disability. *U. S. v. Dickenson*, 2 McLean, 325; *Com. Dig.* 354, Testm. A. 5; *R. v. Castell Careinlon*, 8 East, 77; *Lee v. Gansell*, Cowp. 3; Bull. N. P.

392; *Fitch v. Smallbrook*, *Ld. Raym.* 32; *Cushman v. Loker*, 2 Mass. 108; *Com. v. Gorham*, 99 Mass. 420; *People v. Whipple*, 9 Cow. 707; *People v. Herrick*, 13 Johns. 82; *Blaufus v. People*, 69 N. Y. 107; *Skinner v. Perot*, 1 Ashm. 57; *State v. Valentine*, 7 Ired. 225; *Dawley v. State*, 4 Ind. 128. *Infra*, § 574.

Prisoners who have pleaded guilty, but on whom no sentence has been passed, are constantly admitted in practice as witnesses; and in one of these cases Baron Wood told the man that he would pass sentence upon him, upon his plea of guilty, because he fenced with the questions. *Alderson, B., R. v. Hincks*, 2 C. & K. 464; *S. C.*, 1 Den. C. C. 84. *Infra*, § 445.

In Virginia, upon the trial of a convict from the penitentiary for a felony committed there, another convict confined there for felony is by statute a competent witness for the prosecution. *Johnson's case*, 2 Grat. 581. As to Missouri, see communication in 10 Cent. L. J. 363.

¹ *Walker v. Kearney*, 2 Str. 1148; *R. v. Gardiner*, 2 Burr. 1117.

² *State v. Blaisdell*, 33 N. H. 388. See Whart. Cr. Pl. & Pr. §§ 521 *et seq.*; and see *Blane v. Rogers*, 49 Cal. 15.

³ *Infra*, § 441; *U. S. v. Jones*, 2 Wheel. C. C. 451.

It is essential to establish the identity of the witness with the person pardoned.¹

To remove infamy, the pardon must be full. Thus, where a pardon remitted to the convict "the residue of the punishment he was sentenced to endure," it was held that his competency as a witness was not restored.²

Where the disability is attached to the conviction of a crime by the express words of a statute, the pardon will not, according to the better opinion, restore the competency of the offender, the prerogative of the government being controlled by the authority of the express law. Thus if a man be adjudged guilty on an indictment for perjury at common law, a pardon will restore his competency; but the contrary is the case if the conviction is founded on the statute of 5 Eliz. c. 9.³

¹ Com. v. Hanlon, 3 Brewst. 461. This point is fully discussed in Whart. Cr. Pl. & Pr. §§ 521 *et seq.*

² Perkins v. Stevens, 24 Pick. 277; State v. Blaisdell, 33 N. H. 388.

³ R. v. Ford, 2 Salk. 689; Dover v. Maestaer, 5 Esp. 92, 94; 2 Russ. on Cr. 595, 596; R. v. Greepe, 2 Salk. 513, 514; Bull. N. P. 292; Houghtaling v. Kelderhouse, 1 Parker C. R. 241; Phil. & Am. on Ev. 21, 22.

"The power of pardon in criminal cases," it is held by the Supreme Court of the United States, "has been exercised from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." U. S. v. Wilson, 7 Pet. 150. "It is a constituent

part of the judicial system, that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown, and cannot be acted upon. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and would overturn those rules which have been settled by the wisdom of ages. There is nothing peculiar in a pardon which ought to distinguish it, in this respect, from other facts; no legal principle known to the court will sustain such a distinction. A pardon is a deed, to the validity of which delivery is essential; and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him. It may be supposed that no being condemned

A pardon granted *after* the sentence of the court has been complied with, *e. g.* the fine paid or the imprisonment expired, purges disability and restores competency.¹ *Without* pardon, infamy remains,² unless under local law endurance of sentence rehabilitates.³ A pardon *before* conviction, when otherwise legal, is equally operative.⁴

Where a witness for the prosecution, in answer to a question by the prisoner's counsel, states that he had been convicted of felony and pardoned, the *production* of the pardon is not necessary to establish his competency.⁵

Pardons are to be construed like grants, favorably to the grantee.⁶ Thus, an instrument issued by the President of the United States, directing the immediate discharge of one sentenced for mail robbery, was held to be a pardon.⁷

The pardon must correctly recite the offence; and a non-recital or misrecital will render it inoperative.⁸

Where a pardon is obtained by fraud, it is void.⁹

The subject of conditional pardon belongs more properly to another volume. It is sufficient here to say, that where the condition is that the defendant shall leave the State, and he either does not leave, or, having left, returns, the original sentence revives and may be enforced.¹⁰ It was said, however, in a case

to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment." *Ibid.*

¹ U. S. v. Jones, 2 Wheel. C. C. 451; Whart. Cr. Pl. & Pr. §§ 522 *et seq.*

² State v. Benoit, 16 La. An. 273. See, as to restrictions, Whart. Cr. Pl. & Pr. § 522.

³ State v. Williams, 14 W. Va. 851.

⁴ Com. v. Bush, 2 Duvall (Ky.), 264. See Garland, *ex parte*, 4 Wall. 333; Whart. Cr. Pl. & Pr. §§ 522 *et seq.*

⁵ Howser v. Com. 51 Penn. St. 332.

⁶ Wyvil's case, 5 Co. 496; 2 Hawk. P. C. § 13; Com. v. R. R. 1 Grant, 330; Hunt, *ex parte*, 5 Eng. (Ark.)

284. Compare discussion in Whart. Cr. Pl. & Pr. §§ 522 *et seq.*

⁷ Jones v. Harris, 1 Strobh. 160.

⁸ U. S. v. Stetter, U. S. Cir. Ct. Phila. Feb. 1852, Kane, J.; People v. Bowen, 43 Cal. 439.

⁹ Whart. Cr. Pl. & Pr. § 532; 2 Hawk. P. C. 533, §§ 8, 9; R. v. Maddocks, 1 Sid. 480; Com. v. Holloway, 44 Penn. St. 210; State v. McIntire, 1 Jones (N. C.), 1; State v. Leak, 5 Ind. 359.

¹⁰ R. v. Aickless, 1 Leach, 294; R. v. Thorpe, 1 Leach, 391; R. v. Foxworthy, 7 Mod. 153; Wells, *ex parte*, 18 How. U. S. 307; Flavel's case, 8 W. & S. 197; People v. Potter, 1 Parker C. R. 47; 1 Edm. (N. Y.) Sel. Cas. 335; State v. Fuller, 1 McCord, 178; State v. Smith, 1 Bailey, 283; State v. Chancellor, 1 Strobh. 347;

where the condition was merely that the defendant should “depart without delay,” that the sentence did not revive on the defendant’s returning, after having once left.¹ When the time for departure is specified in the pardon, it will not begin to run during sickness or incapacity.² A pardon with a condition precedent does not operate until the condition is performed.³ Acceptance of the condition, when favorable, may be inferred.⁴

In Massachusetts, conditional pardons are expressly sanctioned by statute, and provisions are given by which the conditions may be enforced.

Whether a foreign pardon rehabilitates a witness convicted in a foreign court depends upon the question whether the sovereign granting the pardon is to be considered as having jurisdiction for this purpose by the law of nations.⁵

In Pennsylvania the Revised Code (1860) provides: “Where any person hath been, or shall be convicted of any felony, not punishable with death, or any misdemeanor punishable with imprisonment at labor, and hath endured, or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon by the governor, as to the felony or misdemeanor whereof such person was so convicted: *Provided*, That nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony or misdemeanor, and that the provisions of this section shall not extend to the case of a party convicted of wilful and corrupt perjury.”

§ 366. A child may be very far from maturity, but he may be
 Admissi- equally far from idiocy. His memory may be indis-
 bility of tinct, but this peculiarity belongs to the old as well as
 infants de- tinct, but this peculiarity belongs to the old as well as
 pends on to the young. He may be incapable of expressing him-
 intelli- self with precision, but so are multitudes of witnesses
 gence. whose competency is indisputable. On the other hand, he is

State v. Addington, 2 Bailey, 516;
 Roberts v. State, 14 Mo. 138; Opin.
 of Att. Gen. 341-5; Ibid. 368; Com.
 v. Haggerty, 4 Brewst. 329; Fowler
 v. Com. 4 Call (Va.), 35; and see
 other cases Whart. Cr. Pl. & Pr. § 533.

¹ Hunt’s case, 5 Eng. (Ark.) 284.

² People v. James, 2 Caines, 57.

³ Flavel’s case, 8 W. & S. 197.

⁴ Victor, in re, 31 Oh. St. 206.

⁵ See Whart. Conf. of Laws, § 938.

comparatively free from those prepossessions by which the perceptive powers are distorted, his memory is impressible,¹ and he is incapable of maintaining a consistent false narrative. It must be remembered, however, that these observations apply only to the border-land between infancy and maturity ; to permit a child of under three, or even four, years to be sworn and examined, would be trifling with public justice. Hence the dying declarations of a child of four years have been rejected ;² and the admissibility of children of that age is generally questioned.³ On the other hand, the testimony of a child between four and five,⁴ and that of a child between six and seven, have been received on the trial of an indictment for an attempt to ravish.⁵ And we may regard it as settled, that wherever there is intelligence enough to observe and to narrate, there a child, having a due sense of the obligation of an oath, can be admitted to testify.⁶

¹ *Infra*, § 578.

² *Pike's case*, 3 C. & P. 598. *Supra*, § 290.

³ *People v. McNair*, 21 Wend. 608. While there should be every caution applied as to the possibility of a child being tampered with by parents, or by those to whose influence they are particularly subjected, it should be observed that, so far as their own action is concerned, the ideas they receive are much more apt to be transferred unchanged to a third person, than those received by adults. "To them," it is well observed by Mr. Amos (*Great Oyer*, 277), "it is a matter of interest to pay particular attention to the precise words which people utter in their presence. They are usually passive recipients of other persons' ideas and expressions; whereas a grown person, when he hears a statement, is apt to content himself with the substance of it, and to modify it in his own mind, and may be afterwards unable to trace back his ideas to the original impressions."

"The degree of corroboration which the testimony of the witness (an in-

fant) requires is a question exclusively for the jury, to be determined from all the circumstances, and especially from the manner in which the child has given her testimony." *Anderson, J., Givens v. Com.* 29 Grat. 835.

⁴ *R. v. Holmes*, 2 F. & F. 788.

⁵ *R. v. Brazier*, 1 Leach, 199; S. C., 1 East P. C. 443; *Com. v. Hutchinson*, 10 Mass. 225; *State v. Morea*, 2 Ala. 275; and see, to same effect, observations of Alderson, B., in *R. v. Perkin*, 2 Mood. C. C. 135; cf. *Anon.* 2 Pen. (N.J.) 390; *Washburn v. People*, 10 Mich. 372; *State v. Le Blanc*, Mill (S. C.), 354; S. C., 3 Brev. 339. In *Wade v. State*, 50 Ala. 164, a girl of eight years was admitted in a prosecution for sexual assault. S. P., *Givens v. Com.* 29 Grat. 835.

⁶ *R. v. Powell*, 1 Leach, 110; *R. v. Brazier*, 1 Leach, 199; *R. v. Williams*, 7 C. & P. 820; *R. v. Travers*, 2 Str. 700; *State v. Whittier*, 21 Me. 341; *Com. v. Hutchinson*, 10 Mass. 225; *Com. v. Hill*, 14 Mass. 207; *State v. De Wolf*, 8 Conn. 98; *Jackson v. Gridley*, 18 Johns. 98; *People*

§ 367. The admissibility of infants, therefore, depends upon the degree of intelligence and of sense of responsibility in the concrete case.¹ Four years have been, indeed, assigned as a minimum; but after this age the question of admissibility is to be decided by the court, as we will presently see, to its own satisfaction, by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties of perjury.²

No absolute presumption from infancy.

§ 368. The preliminary examination thus requisite is usually undertaken exclusively by the court,³ and it is said that it will require a strong case to sustain a reversal of the ruling of the court examining such a witness.⁴ When a child is incompetent simply for want of instruction

Court may examine witness, or continue trial.

v. McGee, 1 Denio, 19; *Com. v. Carey*, 2 Brewst. 404; *Draper v. Draper*, 68 Ill. 17; *Blackwell v. State*, 11 Ind. 196; *Washburn v. People*, 10 Mich. 372; *State v. Levy*, 23 Minn. 104; *State v. Edwards*, 79 N. C. 648; *State v. Morea*, 2 Ala. 275; *Wade v. State*, 50 Ala. 164; *State v. Denis*, 19 La. An. 119; *State v. Scanlan*, 58 Mo. 204; *Vincent v. State*, 3 Heisk. 120; *Logston v. State*, 3 Heisk. 414; *Flanagan v. State*, 25 Ark. 92; *Warner v. State*, 25 Ark. 447; *Davidson v. State*, 39 Tex. 129; *Brown v. State*, 6 Tex. Ap. 287. See, as to the Ohio limit of ten years, Act of February 14, 1859, § 1. As to same limit in Missouri see *State v. Scanlan*, 58 Mo. 204.

¹ Per Patteson, J., *R. v. Williams*, 7 C. & P. 320. See, however, *Com. v. Hutchinson*, 10 Mass. 225; *State v. Doherty*, 2 Tenn. 80, as to *prima facie* incompetency under fourteen.

“It is said by Blackstone, that ‘where the evidence of children is admitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded solely on the unsupported testimony

of an infant under years of discretion.’ 4 Com. 214. In many cases undoubtedly the statements of children are to be received with great caution, but it is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given. 1 Phill. Ev. 6, 9th ed.” *Roscoe’s Cr. Ev.* 8th ed. 115.

² 1 Leach, 430, n.; *R. v. Nicholas*, 2 C. & K. 246; *Powell’s Evidence*, 4th ed. 29; *Ake v. State*, 6 Tex. Ap. 398.

³ *R. v. Perkins*, 2 Mood. C. C. 135; *State v. Whittier*, 21 Me. 341; *Com. v. Hutchinson*, 10 Mass. 225; *Com. v. Mullins*, 2 Allen, 295; *State v. Lattin*, 29 Conn. 389; *Den v. Vancleve*, 2 South. 589; *Simson v. State*, 31 Ind. 90; *State v. Edwards*, 79 N. C. 648; *Com. v. Le Blanc*, 3 Brev. 339; *Peterson v. State*, 47 Ga. 524.

⁴ *Anon.* 2 Pen. (N. J.) 930; *Peterson v. State*, 47 Ga. 524.

as to the nature of an oath, the practice has been to postpone the case so that the child might in the meanwhile be properly instructed.¹ When, however, "the infirmity," to use the language of Pollock, C. B., "arises from no neglect, but from the child being too young to have been taught, I doubt whether the loss in point of memory would not more than counteract the gain in point of religious instruction."² A temporary suspension, however, to enable a child to recover from agitation, is not merely unobjectionable but proper.³ The preliminary examination of the witness must be public, not private.⁴

§ 369. Capacity, at the time of the occurrence, to perceive the facts testified to, as we shall presently see,⁵ is one of the conditions of credibility. To make such incapacity ground for the *exclusion* of a witness, however, it must be absolute, and must involve an extinction of the faculty by which the particular object could have been perceived. Loss of the applicatory sense, *after* the period of observation, does not affect the admissibility of testimony. Hence, a blind

Deficiency in percipient powers, if total, excludes.

¹ See note to *R. v. White*, 1 Leach, 430.

² *R. v. Nicholas*, 2 C. & K. 246.

³ "The course pursued on the occasion was eminently proper. There is a practice sanctioned by time-honored precedent, under which, when a child is found too young to testify with a proper sense of responsibility, the trial may be postponed until the witness shall have been suitably instructed. This, however, has been criticised, as like 'preparing or getting up a witness for a particular purpose.' In the present case even that objection disappears. While the child was so laboring under nervous agitation from the novelty of the surroundings, as to give unintelligible or absurd answers, she was not permitted to testify. The court merely waited for a natural recovery of mental equilibrium, which should permit the true capabilities of the witness to appear. No sign was visible then in her examination, that she was incapable, either of receiving

just impressions of the facts about which she was to testify, or of relating them truly. We can find no error in the record." *State v. Scanlan*, 58 Mo. 206, Lewis, J.

⁴ In a trial for rape in Indiana, the prosecuting witness was a child only six years old at the time of the trial, which was sixteen months after the alleged offence. The witness being excepted to, she was examined by the court, who, not being satisfied, appointed two gentlemen, who retired with the child to a private room, and after some time reported to the court that "in their opinion her testimony ought to be heard, but received with great allowance." It was held that this reference was irregular, and that the court ought to have acted on its own judgment, at a public examination in the defendant's presence. *Simson v. State*, 31 Ind. 90. See *State v. Morea*, 2 Ala. 275.

⁵ *Infra*, § 373.

man is competent to testify to what he saw prior to his blindness; a deaf man to what he heard prior to his deafness.¹ But a person incapable of perception is *pro tanto* incapable of testifying. If the incapacity of perception is total, — *e. g.* idiocy, — then the incapacity for giving evidence is total.² Where, however, the incapacity of perception is partial, the incapacity to testify cannot be extended beyond the limits of such incapacity to perceive. Thus a blind man can testify as to what he has heard, and a deaf man as to what he has seen.³ Whether a person drunk, or asleep, or etherized at the time of the event, is competent, has been elsewhere discussed.⁴ Stupefaction, no matter from what cause, may be always shown to affect credibility.⁵

§ 370. Insanity, unless amounting to entire extinction of reason, is not now considered ground for absolute exclusion from the witness box.⁶ It is, however, admissible, in order to affect his credit, to prove that a witness was subject to insane delusions;⁷ and it is also admissible to prove that he was at the time intoxicated.⁸

Insane
persons
subjected
to same
test.

¹ Weiske, *Rechtslexicon*, xv. 253; Schneider, *Lehre der Beweis*, § 112. *Infra*, § 374.

² Coleman v. Com. 25 Grat. 865.

³ Harrod v. Harrod, 1 Kay & J. 9; Morris v. Lennard, 3 C. & P. 127; R. v. Powell, 1 Leach, 110; R. v. Travers, 2 Str. 700; R. v. Ruston, 1 Leach, 408; R. v. Wade, 1 Mood. C. C. 86; Com. v. Hill, 14 Mass. 207; State v. De Wolf, 8 Conn. 93.

⁴ 1 Whart. & St. Med. Jur. §§ 245, 789. In Beale's case (2 Whart. & St. Med. Jur. § 266), and Green's case (*Ibid.* § 267), convictions were sustained on the testimony of women as to what took place when they were etherized. But these convictions are open to grave criticism. *Ibid.*

⁵ Tuttle v. Russell, 2 Day, 201; Hartford v. Palmer, 16 Johns. 143;

Sisson v. Conger, 1 Thomp. & C. 564; Duffy v. Com. S. C. Penn. 1878; Fleming v. State, 5 Humph. 564. *Infra*, § 384 a.

⁶ 1 Whart. & St. Med. Jur. § 342; 2 Heard's Lead. Cas. 20; R. v. Hill, 5 Cox C. C. 259; S. C., 2 Den. C. C. 254; 5 Eng. L. & Eq. 547; Fennell v. Tait, 1 C., M. & R. 584; Spittle v. Walton, L. R. 11 Eq. 420; Com. v. Reynolds, cited 10 Allen, 64; Kendall v. May, 10 Allen, 59; Holcomb v. Holcomb, 28 Conn. 177; Livingston v. Kiersted, 10 Johns. 362; Coleman v. Com. 25 Grat. 865; Campbell v. State, 23 Ala. 44.

As to witness imbecile from old age see McCutcheon v. Pigue, 4 Heisk. 563.

In R. v. Hill, *supra*, a lunatic patient, who had been in confinement in

⁷ State v. Kelley, 57 N. H. 549; and cases cited *infra*, § 371.

⁸ *Infra*, § 384 a; Duffy v. State, S. C. Penn. 1878; State v. Buckley, 72

N. C. 358; and cases cited to § 370. As to drunkenness at time of trial see *infra*, § 384 a.

§ 371. If insanity or other mental incompetency be set up as a ground for exclusion, the preliminary examination of the witness is the peculiar province of the court. If the witness, in the opinion of the court, is absolutely

Witness
may be
examined
by judge.

a lunatic asylum, and who labored under the delusion, both at the time of the transaction and of the trial, that he was possessed by 20,000 spirits, but whom the medical witness believed to be capable of giving an account of any transaction that happened before his eyes, and who appeared to understand the obligation of an oath, and to believe in future rewards and punishments, was called as a witness on a trial for manslaughter. It was held that his testimony was properly received in evidence; and that where a person under an insane delusion is called as a witness, it is for the judge, at the time, to say whether he is competent to be a witness, and it is for the jury to judge of the credit that is to be given to his testimony. If upon his examination upon the *voir dire* he exhibits a knowledge of the religious nature of an oath, it is a ground of his admission. If the judge has admitted a witness to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and of observations of his subsequent demeanor, the judge changes his opinion as to his competency, the judge may stop the examination of the witness, strike his evidence out of the notes, and direct the jury to consider the case exclusively with reference to the evidence of the other witnesses. *R. v. Whitehead*, L. R. 1 C. C. 33; 35 L. J. M. C. 186; 14 W. R. 677.

Dr. Ordronaux, commissioner in the case of *State v. N. Y. Hospital*, where the question was the credibility of the testimony of an insane witness, comments as follows on the topic in the text: —

“ Courts have always looked with distrust upon the testimony of the insane, because of its generally misleading character. Nor will this appear surprising when we recall the disturbing influences produced by insanity upon the moral as well as the mental faculties. From the earliest of our decisions, touching the competency of such evidence (*Livingston v. Kiersted*, 10 Johns. 362, A. D. 1813; *Hartford v. Palmer*, 16 Ibid. 143, A. D. 1819), down to the present day, this form of proof has never been considered *prima facie* wherever any other relating to the same series of facts could be obtained. The reasons for this are aptly set forth in the case of *Holcomb v. Holcomb*, 28 Conn. 181, A. D. 1859, where the court, commenting upon the value of such testimony, said: —

“ ‘ The inlets to the understanding may be perfect, so far as any human eye can discern; the moral qualities may all be healthy and active; the conscience may be sensitive and vigilant, and the memory may be able to perform its office faithfully, and yet, under the influence of morbid delusions, reason becomes dethroned, false impressions from surrounding objects are received, and the mind becomes an unsafe depository of facts. . . .

“ ‘ The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly, as upon his disposition to describe them honestly; and if the mind of the witness is in such a condition that it cannot accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make

incompetent, he is to be ruled out.¹ But to justify such exclusion mere streaks of insanity are not sufficient. A man may have many delusions and yet be capable of narrating facts truly; and in any view, the existence of such delusions on his part, at the time of trial, goes to his credit and not to his competency.² Evidence of mental disturbance, at the time of the events narrated, can be received to affect credibility.³ But the court, on being convinced of the incompetency of the witness at the trial, may at any period stop the examination, and direct the jury to disregard the witness's testimony.⁴ This duty, as we have seen, arises when witnesses testify as to what happened to them when unconscious, or when they are more or less intoxicated at the trial.⁵

§ 372. An inquisition of lunacy may be *prima facie* evidence of incompetency,⁶ but does not exclude if upon hearing the court find that the witness understands the nature of an oath, and the facts of which he speaks.⁷ When there is no inquisition, the burden is on the party disputing sanity.⁸

§ 373. We have already noticed that where it appears that a witness was absolutely deficient of the requisite perceptive powers at the time of the event to be testified to, he may be excluded by the court.⁹ Instances of this kind, however, are of very rare occurrence. Very frequent, on the other hand, are those in which the credibility of

but a feeble impression upon the hearer, though it be told with the greatest apparent sincerity.'"

¹ Powell's Ev. 4th ed. 28; R. v. Hill, 5 Cox C. C. 259; S. C., 2 Den. C. C. 254; Holcomb v. Holcomb, 28 Conn. 177; Livingston v. Kiersted, 10 Johns. R. 362; Coleman v. Com. 25 Grat. 865. Supra, § 357; infra, § 374.

² R. v. Hill, 2 Den. C. C. 254; S. C., 5 Cox C. C. 259; R. v. Whitehead, L. R. 1 C. C. R. 33; Spittle v. Walton, L. R. 11 Eq. 420; State v. Kelley, 57 N. H. 549; Campbell v. State, 23 Ala. 44.

³ State v. Kelley, 57 N. H. 549;

Fairchild v. Bascomb, 35 Vt. 398; Holcomb v. Holcomb, 28 Conn. 177; Rivara v. Ghio, 3 E. D. Smith, 264. See Bell v. Rinner, 16 Oh. St. 45. In Vermont the right to examine on *voir dire* is disputed. Robinson v. Dana, 16 Vt. 474.

⁴ R. v. Whitehead, L. R. 1 C. C. 33.

⁵ See 2 Whart. & St. Med. Jur. §§ 245-66. Infra, §§ 375, 384 a.

⁶ Hoyt v. Adey, 3 Lansing, 173.

⁷ See Kendall v. May, 10 Allen, 63. Infra, § 374.

⁸ Infra, § 729.

⁹ Supra, § 369.

witnesses is attacked on the ground of deficient or perverted perceptive powers. These cases may be grouped as follows:—

(1.) *Defect in Discrimination.*—Discrimination is the basis of perception, without which perception is useless for any rational purpose.¹ Unless the eye of a witness discriminates between colors, his testimony as to colors is worthless; and color blindness in such cases (*e. g.* where a witness is called upon to testify as to the color of a railway or ship signal) operates to destroy credibility. A power to discriminate perspective is necessary to enable an observer to decide as to distances; a power to discriminate between refraction and reality is necessary to enable him to determine whether what he sees is the object itself, or only its exaggerated reflection. The most dispassionate and the most accurate of observers, we are told, when on one moving vessel, fail in taking a correct view of the absolute course of another vessel. We cannot overcome the instinctive belief that it is our own vessel that is stationary, and that it is the other alone that moves. Hence admiralty courts have held that the testimony of mere observers on board a vessel is to yield, in cases involving the course and deflection of the vessel, to that of those who hold her helm in their hands.² What is true of the sea, is true, though in varying degrees, of the land.³ We all occupy stand-points which make us, however honest, more or less incapable of perfectly accurate observation. Until allowance be made for this incapacity, no testimony can be properly weighed. As to *sounds*, the same distinction may be taken. Whether a witness can give his opinion as to what a sound means is hereafter discussed;⁴ but there can be no question that when the issue depends upon the identification of tunes or sounds, a witness's credibility, in this respect, depends on his knowledge and capacity for discrimination. A particular tune, it is alleged, is sung by a mob as a mark of treasonable purpose; and the effect of the evidence on this point depends in part upon how far the witnesses were able to discriminate between tunes.

¹ See Bain's Study of Character, 258–59. “Discrimination is the very beginning of our intellectual life.” Bain's Mind and Body, 81, adopted in Calderwood, Mind and Brain, 218.

² McNally v. Meyer, 5 Ben. 239.

³ For mistake arising from refraction in land see De Boismon on Hallucinations, 105.

⁴ *Infra*, §§ 459–60.

The whistle of a steam-engine, when indicating danger, will be full of meaning to a railroad officer, while the same signal would be unnoticed by an Indian who might be loitering in the neighborhood. On the other hand, the railroad officer would be incapable of discriminating between sounds whose meaning the Indian would at once catch. Of course these remarks are peculiarly applicable to cases where the object testified to by a witness is something of which he is ignorant.¹ A great world exposition may be visited by six specialists, each one thoroughly versed in his own department, and thoroughly ignorant of the departments of his associates. If one of these should be examined as to what he saw, he would be able to give the differentia of his own specialty, but the differentia of no other.

(2.) *Lack of Interest.* — This may come from frivolity, as in the case of the fop mentioned in the "Spectator," who saw nothing in a large public assembly but the dresses of certain persons of fashion; or from absorption in some other topic, as was the case with the great scientists whom Gulliver noticed, who, during their periods of study, had flappers by them to call their attention to any object which it might be their duty to notice. Swift's satire was no doubt pointed to the affectation of absorption he elsewhere commented on in philosophers; but there are many others beside philosophers whose testimony as to what took place in their presence is open to this criticism. "I was so much engaged at the time that I did not observe what was done or said until my attention was called to it." A witness, under such circumstances, is apt to work into what he himself saw or heard that which was told him at the time by the person arousing his attention; and even when this is not the case, the fact of his absorption in another topic is to be taken into consideration when determining the accuracy of his perception. Persons, also, who are absorbed in any great personal grief, or whose faculties are paralyzed by a sudden shock, lose their power of discrimination as to passing events.² We notice this in the paucity of de-

¹ Illustrations may be found in rape cases, as noticed in Whart. Crim. Law, 8th ed. § 565. See Barrett v. Williamson, 4 McL. 589; Willet v. Fister, 18 Wall. 91; People v. Bodine, 1 Edm. (N. Y.) Sel. Cas. 36;

Julke v. Adam, 1 Redf. (N. Y.) 454; Jacksonville R. R. v. Caldwell, 21 Ill. 75; Durham v. Holeman, 30 Ga. 619; Evans v. Lipscomb, 31 Ga. 71; Hitt v. Rush, 22 Ala. 563. *Infra*, § 377.

² See illustrations in Carpenter's Ment. Phys. art. 359 *et seq.*

tails given in the narratives of persons relating the facts of a crime of which they were the surprised and terrified witnesses. Want of circumstantiality infects other narratives with discredit,¹ but does not so affect these.

(3.) *Partisanship and Prejudice*. — Witnesses to a riot in which partisanship runs high are apt to be inflamed by sympathy with their friends and hatred to their foes. We find this illustrated in the trials of the Philadelphia rioters in 1844.² The “Native American” witnesses testified, when speaking of specific collisions, to great ferocity in the appearance of the champions of the opposite party, and to great calmness and self-control in their own champions; while the Irish witnesses testified to the contradictory opposites.

(4.) *Expectancy*. — That which is ardently and confidently expected is sometimes believed to be seen by a person of a vivid and overstrained imagination. Mr. Dendy gives us a case in which a crowd of persons was collected in the neighborhood of Northumberland House by the confident assertions of two or three gentlemen, made for the purpose of experimenting on this very faculty, that they saw the stone lions on the door-way wag their tails. “They are doing it again; look;” and several of the by-standers thought they saw the tails moving. Some of the phenomena in table-turning may be thus explained; and a good many of the discrepancies in cases of identity.³ Symptoms of disease, also, when expected, are often believed to exist. A

¹ *Infra*, § 379.

² See Whart. on Hom. App. Compare *Chicago R. R. v. Triplett*, 38 Ill. 482.

³ “After the disappearance of Dr. Parkman, when public curiosity was greatly strained on the question whether he had been seen after the day on which it was alleged that he had been murdered, several entirely honest witnesses were convinced that they had seen him in some of his old haunts at the time when, there is now no question, he was dead. Numerous have been the persons who, since the disappearance of Charlie Ross, have honestly declared that they recognized

the lost child in places so remote from each other, and at times so close, that it is clear that some of them, at least, were mistaken. The same remarkable aberration of the perceptive powers was illustrated in the trials consequent on the Lord George Gordon riots, and on the Philadelphia riots in 1844, already noticed. In each of these cases the collisions were brought about by intense religious animosity. There was a conviction among certain classes of Protestants, and especially among those from the north of Ireland, that the Roman Catholics were about to rise to murder the foes of their church, and that certain well-

person, for instance, imagines he has swallowed a pin, and then believes that he feels lacerations in the bowels such as that

known and conspicuous Roman Catholics were to be foremost in the work of blood. There was a conviction among certain classes of the Roman Catholics that certain prominent Protestant leaders were engaged in preparing for a slaughter of Roman Catholics, and the destruction of Roman Catholic churches. When the leading rioters were tried, it is remarkable how ubiquitous these champions, on both sides, are sworn to have been, and yet at the same time what vanishing properties they appear to have possessed. In the Philadelphia cases, for instance, when the Protestant rioters were on trial, witnesses from the opposite ranks were found in abundance to testify to the activity of certain leading Protestant agitators in the fray; which participation was negatived by witnesses for the defence. The same condition of things was exhibited when the Roman Catholic rioters were on trial; and it was noticed that one prominent and very obnoxious Roman Catholic alderman was sworn to have been conspicuous in so many distinct operations of mischief that this very multiplicity of inconsistent employments gave strong corroboration to the testimony of his friends that during the whole of the riots he kept quietly at his home. The same observation may be made as to the English prosecutions of the Roman Catholics under the auspices of Titus Oates. That Oates knowingly perjured himself there is no question. But there were other witnesses for the prosecution whom we cannot so readily dispose of, as they were persons whose honesty of purpose, whatever we may say of their susceptibility to excitement, was unquestioned and unques-

tionable. The only solution is that here proposed — weak capacity for the perception of identity, acted on by powerful distorting prejudices. The mental eye, never very accurate, is overstrained. It is feared, or hoped, or even believed, that a particular person will be in a particular place. Somebody else is converted into that particular person.

“Are such transmutations or idealizations of appearances dependent upon public excitement, as in the cases just mentioned? It would be fortunate for public justice if they were, since in this way our distrust would be limited to cases which involve public excitement. But so far from this being the case, we find that the same deranging and transmutive influence is exercised, on many minds, by any intense personal longing. There are few impostors, striving to seize upon some vacant chair in a desolate household, that have not had at least some sort of temporary recognition of this class. We have before us a French trial, of which the basis was the disappearance of a young girl from a peasant's home. Two years afterwards, a girl, much resembling the lost child, made her appearance in the neighborhood, and was greeted by some of the neighbors as the lost child reappeared. The new-comer, not originally an impostor, but under the influence of one of those not infrequent psychical conditions in which self-deceit and epidemic delusion mingle, assumed the part thus assigned to her, and appeared in the bereaved home. The strangest part of the procedure was that she was welcomed by the family as really the person she claimed to be; and it was not until months had passed,

which a swallowed pin might be supposed to produce. Symptoms may thus be detailed which are unreal, and yet which may be honestly believed in.¹

(5.) *Deception*. — The discrimination of the most observant may be baffled by disguises assumed in order to promote or impair identification.²

§ 374. A witness may have been capable of perceiving yet be incapable of narration. He may have no powers of speech, and have no means of expressing himself by signs. He may have become insane since the occurrences he is called upon to relate. If, however, such incapacity is temporary, the court will in proper cases direct an adjournment so that it may be overcome.³ But the application must be made before the jury is sworn.⁴ And his case must be one which promises a speedy restoration.⁵

Incapacity to narrate may affect competency.

§ 375. Deaf and dumb persons were formerly regarded as idiots, and therefore incompetent to testify; but the modern doctrine is that if they are of sufficient understanding, and know the nature of an oath, they may give evidence either by signs, or through an interpreter, or in writing.⁶ A deaf mute may be permitted to express himself in writing, if this be the mode in which he can be better under-

Deaf and dumb not incompetent.

and a series of counter recognitions sprang up from the family to which she really belonged, that the delusion was dispelled. Lady Tichborne's recognition of the claimant as her lost son is a more familiar illustration of the same phenomenon." 1 Crim. Law Mag. 3-4. She was passionately convinced that he would certainly reappear; and his reappearance in the person of the claimant she believed. The same criticism applies to Lady Vane's declarations in the Vane case, before Malins, V. C., December, 1876. Another illustration to the same effect is given by Dr. Wigan (Duality of the Mind, 56): "I was in Paris at a *soirée* given by M. Bellatt, some days after the execution of the Prince of Moskawa. The usher, hearing the name of M. Maréchal *ainé* (the elder), an-

nounced M. le Maréchal Ney. An electric shudder ran through the assembly, and, for my part, I own that the resemblance to the prince was for the moment as perfect to my eyes as the reality."

¹ See supra, § 271.

² See De Boismont, op. cit. 105.

³ R. v. White, 1 Leach, 430, n. a. Supra, §§ 368-9, 371.

⁴ R. v. Wade, 1 Mood. C. C. 86; R. v. Kinloch, 18 How. St. Tr. 402.

⁵ Supra, § 368.

⁶ 1 Hale P. C. 34; R. v. Ruston, 1 Leach C. C. 408; R. v. Wade, 1 Mood. C. C. 86; Morrison v. Lennard, 3 C. & P. 127; Com. v. Hill, 14 Mass. 207; State v. De Wolf, 8 Conn. 93; People v. McGee, 1 Denio, 19; Snyder v. Nations, 5 Blackf. 293. See supra, § 368; and see 1 Whart. & St.

stood, or through a sworn interpreter by whom his signs can be interpreted.¹ Such interpretation is not hearsay,² nor is it excluded by the fact that the witness can write.³

§ 376. Pecuniary interest in a case is by no means the only influence by which bias, on the part of a witness, is produced. Relationship, party sympathy, personal affection, influence the perceptive powers at least as effectively as does pecuniary interest; and it is easy to conceive of cases in which the guilt of perjury may, in certain very rude or very corrupt conditions of society, appear to be not so great as the guilt of disclosing a confidence.⁴ Now, however, when all disqualifications are removed, and when proof of interest goes only to credibility, influences of all kinds are equally objects of consideration, in determining how far credibility exists. Credibility, therefore, so far as it depends upon the capacity for accurate narration, is now relieved from the obstructions pro-

Med. J. §§ 95, 461. See *Harrod v. Harrod*, 4 K. & J. 9, and cases in next section.

¹ *R. v. Ruston*, 1 Leach C. C. 408; *R. v. Steel*, 1 Leach, 452; *Morrison v. Lennard*, 3 C. & P. 127; *Com. v. Hill*, 14 Mass. 207; *State v. De Wolf*, 8 Conn. 93; *Snyder v. Nations*, 5 Blackf. 295.

² *Supra*, § 224.

³ *State v. De Wolf*, 8 Conn. 93.

⁴ "According to the received code of honor, when a lady's reputation is concerned, a gentleman is bound to act like the loyal servant who (in 1716), when twitted with having sworn falsely to save Stirling of Keir's life, said he would rather trust his soul with God than his master's life with the Whigs." *London Quarterly Rev.* Jan. 1878. Art. on Lord Melbourne.

"If we should judge from some of the recent English election cases, we might conclude that this preference still continues, and that the reluctance to trust a master's life to Tories is as great as is the reluctance to trust a

master's life to Whigs. Bribery disqualifies; bribery is an indictable offence; bribery is shown to have been lavishly employed; but the agent who employs it is a Mr. Smith or a Mr. Jones, who never was heard of before or after the election, whom nobody on either side employed, and whom nobody on either side knew. And in our own inquiries into questions of bribery, the identity of the persons bribing is either clothed in the same mystery, or, when certain persons are identified as being concerned in the illegal act, these persons uniformly swear they know nothing about it. So generally is this the case that it is now recognized that no case of bribery can be proved, unless (1.) by some one of the parties having some great pecuniary or political inducement to disgrace his associates; (2.) by some innocent by-stander fortuitously hearing part of the transaction; or (3.) by extrinsic facts from which a case of guilt can be inferred." 1 *Crim. Law Mag.* 6.

duced by the old rules, and is determinable by the ordinary laws of free logical criticism. In criminal trials, though the abolition of exclusions on ground of interest makes little change, a very great change has been produced by the statutes now generally adopted enabling defendants to be examined in their own behalf. But aside from this conspicuous case of rehabilitation in the face of the most powerful bias, there are no cases in which party sympathy, personal friendship, family affection, operate, as a rule, so effectively as they do where life and liberty are at stake. In such cases, while (unless in the relationship of marriage, to be hereafter discussed) there is no exclusion on account of bias, no matter how strong, bias is always of importance in determining credibility. Nor is this exclusively on the ground that bias prompts perjury. So it may sometimes do; but cases of this class are rare, while cases in which bias leads to unconscious perversion of facts are frequent. "Though we are accustomed to speak of memory as if it consisted in an *exact* reproduction of past states of consciousness, yet experience is constantly showing us that this reproduction is very often *inexact*, through the modification which the 'trace' has undergone in the interval. Sometimes the trace has been partially obliterated; and what remains may serve to give a very erroneous (because imperfect) view of the occurrence. And where it is one in which our own feelings are interested, we are extremely apt to lose sight of what goes against them, so that the representation given by memory is altogether one-sided."¹ For these reasons, interest and party sympathy may be always shown in order to discredit a witness,² and the same observation may be made as to near relationship.³ But immorality cannot be introduced to affect credibility unless it be involved in a reputation for untruth.⁴

§ 377. We have already noticed that the credibility of a witness depends (1.) on his capacity to observe; and (2.) on his capacity to narrate. It should be no-

And so of
want of fa-
miliarity
with topic.

¹ Carpenter, *Ment. Phys.* art. 365 Penn. St. 417; Tardif *v.* Baudoin, 9 *et seq.* Dr. Carpenter adds several La. An. 127. curious illustrations.

² *Infra*, §§ 476-7, 488.

³ *Infra*, § 488; Gangwere's Est. 14

⁴ *Infra*, § 487; State *v.* Randolph, 24 Conn. 363; Smithwick *v.* Evans,

24 Ga. 461.

ticed, in the latter connection, that capacity to narrate may depend in a large measure on a special acquaintance with the thing narrated. A physician who has once visited a patient can speak as to this visit, but cannot speak as to idiosyncrasies he had no time to study.¹ Farmers will be entitled to credit in agricultural matters, as to which other persons are of no authority;² and so, *mutatis mutandis*, as to architects.³ Familiarity with the thing testified to, therefore, though not essential to competency, is of much importance in determining credibility, for a witness is entitled to little credit when he speaks of that which he does not comprehend.⁴ In questions of identity this caution is to be peculiarly observed.⁵

§ 378. But capacity for observation and narration are not the only constituents of credibility. There must also be a capacity to recollect, or as it is called by high authority,⁶ to “reproduce.” As conditions of the trustworthiness of such “recollection,” or “reproduction,” may be mentioned the following:—

(1.) *Consciousness of Identity.*—The witness must be sure that he is the person that saw or heard the thing he narrates. It may happen that by hearing a thing very often we may believe we saw or heard it ourselves. The rule excluding hearsay is based on this condition. A witness, to entitle his statement to reception, must be sure that what he states he himself observed.⁷

¹ See *Barrett v. Williamson*, 4 McLean, 589; *Durham v. Holeman*, 30 Ga. 619; *Hitt v. Rush*, 22 Ala. 563.

² *Jacksonville R. R. v. Caldwell*, 21 Ill. 75.

³ *Tucker v. Williams*, 2 Hilt. (N. Y.) 562. See *infra*, § 408.

⁴ See fully on this point §§ 19, 160.

⁵ *Infra*, § 802; *Whart. on Ev.* § 409.

⁶ *Carpenter*, *op. cit.* art. 340.

⁷ As to untrustworthiness from want of this condition see *Carpenter*, *op. cit.* art. 353.

“It is said that there are men who, by often telling a mendacious story as true, come at last to believe it to be true. When this happens, the fact

is that a case of the memory of *ideas* comes to be mistaken for a case of the memory of *sensations*.

“How did the man know at first that it was a fictitious story; and how did he afterwards lose that knowledge?”

“He knew, at first, by certain associations; he lost his knowledge by losing those associations, and acquiring others in their stead. When he first told the story, the circumstances related called up to him the idea of himself fabricating the story. This was the memory of the fabrication. In repeating the story as real, the idea of himself fabricating the story is hurried over rapidly; the idea of

(2.) *Consciousness of Succession as to Time.* — It must not be, “I see this now;” but “I saw it at some prior time.” We must therefore add to the consciousness of identity the consciousness of that identity continuing from the time specified to the present time. Upon the time thus fixed for the act depend in a large measure its juridical bearings.¹ When was it, for instance, that a witness states that a document claimed to be forged was executed? When was it that he saw a person at a particular place? It may be that to make out a false case of *alibi*, the facts belonging to one point of time are transferred to another at which it is proposed to fix the *alibi*.² But unless by some such process facts are transferred in a body from one date to another, there will be a want of that circumstantiality which is so important an element in credibility. And when a body of facts is thus transferred to a false date, this very circumstantiality enables the falsehood to be the more readily detected. But no fact can be stated without some date assigned to it, even though the date be merely negative, — *i. e.* if the thing is not happening now, it happened before the present moment. And credibility is apt to diminish in proportion to the failure of precision as to date.

(3.) *Location in Space.* — This is also an essential condition of reproduction by memory. “In the original act of observation I must have been in some place, and the object observed must have sustained some relation to attending or accompanying objects. Neither myself nor the object can ordinarily be recalled without some of these accompaniments involving relations to space.”³

(4.) *Derangement of the Associative Powers.* — On these powers, as has been seen, reproduction by memory depends.⁴ To recall an isolated fact, if this were possible, would be to recall

himself as actor in the story is dwelt upon with great emphasis. In continued repetitions, the first circumstance being attended to as little as possible, the association of it grows weaker and weaker; the other circumstance engrossing the attention, the association of it grows stronger and stronger, till the weaker is at last

wholly overpowered by the stronger, and ceases to have any effect.” Mill on the Human Mind, vol. i. 333.

¹ See Porter on Hum. Int. § 273.

² A case of this is reported in 1 Crim. Law Mag. 8; 17 Alb. L. J. 40.

³ Porter, *ut supra*, § 273.

⁴ See New Quar. Mag. April, 1880, p. 310.

something which, as it had no relation to past life, can have no relation to present conduct. The fact must have attached to it not only time and place, but collateral circumstances; and in proportion to the accumulation about it of supporting facts does its credibility increase. But the powers of association are subject to various derangements, among which the following may be specified. (*a.*) *Inert association*, arising sometimes from congenital defects, sometimes from the enfeebling effects of time,¹ some-

¹ "The impairment of the memory in old age commonly shows itself in regard to *new* impressions; those of the early period of life not only remaining in full distinctness, but even, it would seem, *increasing* in vividness, from the fact that the Ego is not distracted from attending to them by the continual influx of impressions produced by passing events." Carpenter's *Ment. Physiology*, art. 351. Illustrations will be found in Porter on the *Human Intellect*, § 299. Dr. Carpenter attributes this phenomenon to the peculiar plasticity of the brain in childhood. President Porter notices other influences tending to the same result. "The news, the markets, the politics, the literature, the society that occupied his attention so exclusively (in earlier days), are now less attended to, because they are less cared for. In place of an intent and absorbed devotedness to the present, there is a more frequent review of the past. Old scenes are described, old books are read, old companions are talked of, old stories are repeated. The best energies of the mind are given to these objects, while the mind scarcely heeds, or with enfeebled interest, the scenes, the persons, and events that are present. For this reason, recent objects are so readily forgotten, and the singular contrast is furnished of the memory peculiar to the aged, — most tenacious of objects and events that occurred longest ago,

and readily forgetful, if forgetful at all, of those that were most recent." Porter, *Human Intellect*, § 299.

Two theories, it will be thus observed, are proposed to account for the retentiveness of memory. The first (the physical) assumes a substance on which impressions are inscribed. The second (the psychical) assumes the non-corporeal existence of these impressions.

Sir W. Hamilton, after noticing the hypothesis that memory is an impression on the substance of the brain, says (Lecture xxx. *Metap.*): "It may be satisfactory to know that this faculty does not stand in need of such crude modes of explanation. . . . If the unity and self activity of the mind be not denied, it is manifest that the mental activities, which have been once determined, must persist, and these corporeal explanations are superfluous." "The problem," he says, in a prior passage, "most difficult of solution is not how a mental activity endures, but how it ever vanishes." To same effect is McCosh on *Emotions*, p. 69.

As to the power of association see further *infra*, § 454 *a.* Compare Laycock on *Defects of Memory*, *Edin. Med. Jour.*, April, 1874; Laycock on the *Laws of Memory*, *Jour. Ment. Science*, July, 1875.

President Porter cites the following from Coleridge (*The Friend*, sec. ii. *Essay iv.*): "No finer opportunity is

times from the habit of adjusting the mind for only temporary purposes to an immediate object.¹ (b.) *Imaginative association*,

furnished for observing this variety in the order and method which characterize the memory of different persons than in listening to the testimony of different witnesses in a court of justice concerning the same transaction. One witness tells a long and rambling story, which follows the order of his own observations in time, and recites the most trifling accompaniments of place and circumstances. Another recounts those only which are material to the object for which he gives testimony."

A great master of legal logic thus speaks: "There are things which pass every day, which make no impression on the mind of one man, but which do make an impression on the mind of another. Men dine at the same mess or table; something occurs in the course of the conversation; one man remembers it, the other does not think of it any more, and the next morning it is forgotten. One man recollects some event in his past life, more or less important, or more or less trivial, which some one else present at the same time, if you were to ask him about it, would have no knowledge or recollection of at all. Of all the unfathomable mysteries which the human mind presents, there is none in my view so astonishing as the faculty of memory, especially in the matter to which I am now adverting; that is how some things comparatively trivial remain indelibly impressed on the recollection, while others, far more important, fade away into the darkness of eternal night, and are totally and entirely forgotten. It would not be fair, therefore, to say, 'Here are half a dozen people who were present with you on a certain occasion, and they all recollect a certain fact. If

you do not remember it you cannot be the man.' Still less just would it be if each of those individuals was allowed to pick out some peculiar circumstance which has remained impressed on his individual memory, and then, because the man did not recollect all that the six persons recollected, it should be said, 'Oh, you cannot be the man.' I quite agree, we must not deal with a man in that way; it would be unfair and unjust to do so; but there are things which it is next to impossible any one should forget, and in respect of those things we are entitled to require that a man should exhibit some knowledge, when you know that they happened to a person whom he represents himself to be. Yet even here we must be on our guard; for even things of importance, things that you would have expected to remain impressed on a man's memory, often pass away and are forgotten; but if you find that a multitude of circumstances such as you cannot reasonably believe that a man could have forgotten are unknown, a very different case presents itself." Cockburn, C. J., charge in Tichborne case.

¹ In illustration of the subsequent torpor produced by the concentration of the associative powers for a temporary purpose on a special case, Dr. Carpenter tells us that "a distinguished equity judge has recently favored" him (Dr. C.) with the following experience: "It has frequently occurred to him that 'further proceedings' having been taken in a 'cause' which he had 'heard' some years previously, and had dismissed altogether from his mind, he has found himself in the first instance to have totally forgotten the whole of the *former* proceedings, not being able to

as where certain objects, associated with a particular place, are assumed to be at such place at a particular visit.¹ (c.) *Insane*

recollect that the 'cause' had been previously before him. But in the course of the argument some word, phrase, or incident has furnished a suggestion that has served *at once* to bring *the whole case* vividly into his recollection; as if a curtain had been drawn away, and a complete picture presented to his view. The entireness of his previous forgetfulness was probably due to the habit, common to barristers, of 'getting up' their cases only to forget them as soon as possible." Carpenter, *op. cit.* art. 343.

"It is now very generally accepted by psychologists as (to say at least) a probable doctrine, that any idea which has once passed through the mind may be thus (by memory) reproduced, at however long an interval, through the instrumentality of suggestive action; the recurrence of any other state of consciousness with which that idea was originally linked by association being adequate to awaken it from its dormant or 'latent' condition, and to bring it within the sphere of consciousness." Carpenter's *Ment. Physiology*, art. 340. See fully *infra*, §§ 454, 806.

¹ Realistic details, it should be remembered, may not only be left out, but may be added, in entire unconsciousness of the falsity of the effect produced. That which we are in the habit of associating with an event when real, we invest that event with permanently, and conceive of it as surrounding the event even when unreal. Some years ago two banks were on opposite wings of a particular building in Philadelphia, with entrances very much alike. A gentleman who kept an account with Bank A., and who was accustomed to leave checks without his bank book with

the receiving teller, took with him on a particular day a check intending to hand it in at Bank A. By mistake he went into Bank B., and the check was taken by the teller at Bank B., he supposing that the intention of the depositor was to open an account in the latter bank. Some weeks afterwards, when the depositor took his book to Bank A. to be settled, he was surprised to find that he was not credited with the particular check he thought he had left there. "Why, I recollect the conversation I had with you at the time," he said to the teller. The recollection was honest, for he had been in the habit, when he went into the bank, of having a conversation with the teller about some interests they had in common. Recollecting, as he supposed, the fact of the deposit, he associated with it its ordinary incidents. So convinced was he of the deposit that he felt that he could no longer put confidence in the bank to the negligence of whose officers he imputed the loss. Many months afterwards, however, on visiting Bank B., the teller of that bank said to him, "You do not want to follow up the deposit you made here some time since." The truth then flashed across him. He had made the deposit in Bank B. instead of in Bank A.; but believing it to have been in Bank A., and conceiving such to be the case, he associated with the supposed fact the usual incidents of such a fact, and accumulated about it circumstantial details which were natural and exact, but erroneous only in their application to the particular time.

Dr. Wendell Holmes says: "Sometimes, but rarely, one may be caught making the same speech twice over, and yet be held blameless. Thus a

association, as where the unreal, without reason, and even without actual precedent, is associated with the real.

Whatever may be the explanation of defect of memory in a witness, such defect is a legitimate ground of argument to a jury,

certain lecturer" (Holmes himself, doubtless), "after performing in an inland city, where dwells a *littératrice* of note, was invited to meet her and others over the social tea-cup. She pleasantly referred to his many wanderings in his new occupation. 'Yes,' he replied, 'I am like the huma, the bird that never lights, being always in the cars as he is always on the wing.' Years elapsed. The lecturer visited the same place once more for the same purpose. Another social cup after the lecture, and a second meeting with the distinguished lady. 'You are constantly going from place to place,' she said. 'Yes,' he answered, 'I am like the huma,' and finished the sentence as before. What horror, when it flashed over him that he had made this fine speech, word for word, twice over! Yet it was not true, as the lady might perhaps have fairly inferred, that he had embellished his conversation with the huma daily during that whole interval of years. On the contrary, he had never once thought of the odious fowl until the recurrence of precisely the same circumstances brought up precisely the same idea. He was not in the slightest degree afraid of brain disease. On the contrary, he considered the circumstances indicative of good order in the mental mechanism. 'He ought to have been proud,' says Holmes, speaking for him, and meaning no doubt that he was proud, of the accuracy of his mental adjustments. *Given certain factors, and a sound brain should always evolve the same fixed product with the certainty of Babbage's calculating machine.*" Popular Science Monthly, May, 1879, p. 78.

"Sometimes, indeed, we come so completely to *realize* such forgotten experiences, by repeatedly *picturing* them to ourselves, that the ideas of them attain a force and vividness which equals or even exceeds that which the actual memory of them would afford. In like manner, when the imagination has been exercised in a sustained and determinate manner,—as in the composition of a work of fiction,—its ideal creations may be reproduced with the force of actual experiences; and the sense of personal identity may be projected backward (so to speak) into the characters which the author has evolved out of the depths of his own consciousness." Carpenter, *op. cit.* art. 364.

The tenacity of association may be illustrated by the way in which persons subject to sea-sickness are sometimes affected with nausea at the sight of a ship tossing on the waves.

A valuable article on the topic in the text will be found in the London New Quart. Mag. April, 1880, p. 310.

"Dr. Plot, in his history of Staffordshire, tells us of an idiot that chancing to live within the sound of a clock, and always amusing himself with counting the hour of the day whenever the clock struck, the clock being spoiled by some accident, the idiot continued to strike and count the hour without the help of it, in the same manner as he had done when it was entire. Though I dare not vouch for the truth of the story, it is very certain that custom has a mechanical effect upon the body, at the same time that it has a very extraor-

and must be weighed by them in making up their opinion as to the credibility of a witness. A witness, as we have seen, cannot be excluded on this ground, unless the loss of memory be total.¹ The ordinary way of bringing out such defect before the jury is by cross-examination. But there can be now no question that evidence going to show any impairment of memory is admissible, provided such testimony is direct and not second hand.² But habits (*e. g.* use of narcotics) likely to impair memory cannot be put in evidence. Such proof, aside from other objections, is secondary. Actual decay or derangement may be proved; not habits likely to have such an effect.³

dinary influence upon the mind." Addison, Spectator No. 447.

¹ See Whart. on Ev. § 410; Lewis v. Ins. Co. 10 Gray, 508; Kurtzman v. Weaver, 20 Penn. St. 422.

² Supra, §§ 370-1; Fairchild v. Bascomb, 35 Vt. 398; Com. v. Cooper, 5 Allen, 495, cited supra, § 302; Livingston v. Kiersted, 10 Johns. 362; Brindle v. McIlvaine, 10 S. & R. 285, where it was argued by Gibson, C. J., that proof of prior paralysis was admissible; Ketchey v. State, 70 N. C. 621; Isler v. Dewey, 75 N. C. 466; Fleming v. State, 5 Humph. 564.

³ McDowell v. Preston, 26 Ga. 528. See Goodwyn v. Goodwyn, 20 Ga. 600.

In *Alleman v. Stepp*, Iowa Supreme Court, 1880 (21 Alb. L. J. 233), "the plaintiff introduced a physician who testified that he had known the defendant (who was a witness in the case) from a time prior to the amputation of his limb. He was then asked to state the condition of defendant's mind as to memory before and after the injury; to state the effect of the injury upon defendant's memory as to money and finances in particular; and to state whether, in the opinion of the witness, the mind of the defendant was greatly impaired. The evidence, upon defendant's ob-

jection, was rejected. We think," continued Beck, C. J., giving the opinion of the court, "the ruling erroneous. Surely, if defendant was suffering from an impaired mind, which affected his memory, the fact would tend to lessen the credit to be given to his testimony. Can it be doubted that the credibility of a witness may be assailed by showing his want of mental capacity? It is said that the infirmity of memory should be shown by cross-examination. But it might not be made to appear in that way, though it really existed. The witness was a physician, and knew the defendant before and after the injury, and the condition of his mind as to memory. He was surely competent to state the fact of defendant's loss of memory, and, in our judgment, he was competent to state his opinion of defendant's mental condition, based upon his knowledge and observation of the defendant before and after the injury. If, in this way, it should be made to appear that defendant's memory was impaired by disease, his credibility would be impeached. Under familiar rules of law the credibility of a witness may be impeached by showing moral defects. Mental defects in the witness, as loss or impairment of memory, will, according to the obser-

§ 379. Fabricators deal usually with generalities, avoiding circumstantial references which may be likely to bring their statements into collision with other evidence ; and hence it is properly held that a studied avoidance of details, by witnesses, throws suspicion on their statements.¹ This, however, depends upon the object to be recalled. Events of remote date we cannot expect a witness to remember in detail ; and some portion, at least, of such circumstances we must be prepared to find lost in haze. If involving matters of deep interest to the witness they may be remembered in their effects, but not ordinarily in their particulars. A minute specification of details, as to very distant events in which the witness had no personal interest, does not enhance credit ;² its absence

Want of
circum-
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vation of all men, detract from the credibility otherwise due a witness, just as surely as do moral defects.

“ It is not reasonable to hold that the law will permit impeachment of a witness by showing the moral defects of his character, and will not permit impeachment by proof of defects of memory caused by disease of the body or mind.

“ Under the rules of evidence and statutes of this State a witness may be impeached by proof of his bad moral character, and that his reputation for veracity is so low that he cannot be believed under oath. The impeaching witness notes his conclusions, belief, or opinions, based upon knowledge of the character and reputation of the witness whose credibility is brought in question. The like course was proposed in this case, to impeach the defendant, by showing his mental defects. The testimony excluded was of the conclusion, belief, and opinion of the witness, based upon knowledge that defendant's memory was impaired by disease affecting the mind. It is proper to say that the rule we recognize extends no further than to permit the impeachment of a witness by showing an abnormal condition of

the mind, caused by disease or habits which impair the memory. It will not permit evidence of the want of strength or accuracy of memory of a witness whose mind is not shown to be in an abnormal condition.

“ While it is true that the memories of men of sound physical and mental health are not equally strong and accurate, or they are unequal in other faculties of the mind and in physical development, the law can devise no standard of measurement or test of the mind in its normal condition. It cannot be compared with the mind of others, in view to impeach or support the memory.”

¹ See supra, § 107; Spicott's case, 5 Rep. 58; Presbytery of Auchterarder v. Kinnoul, 6 Cl. & F. 698; Walker v. Blassingame, 17 Ala. 810; Cornet v. Bertelsmann, 61 Mo. 118. “ *Dolus versatur in generalibus*, — a person intending to deceive deals in general terms, — which has been adopted from the civil law, and is frequently cited and applied in our courts.” Broom's Legal Max. 289. But compare comments supra, § 373.

² Willet v. Fister, 18 Wall. 91; Parker v. Chambers, 24 Ga. 518; Chandler v. Hough, 7 La. An. 441.

as to such events does not detract from credit.¹ But to matters which the witness, under ordinary circumstances, would remember, the test fairly applies.

§ 380. In criminal as well as civil trials, appeal is frequently made to the maxim, *Falsum in uno, falsum in omnibus*, and the criticism is proper in cases in which the special falsity is of a nature to imply falsity as to the whole case;² or when the contradictions are so numerous as to show imbecility of memory.³ Beyond this, however, we cannot go.⁴ There are instances, in connection even with an examination in chief, in which a witness may swear falsely in a particular line, and yet with such truthfulness as to the rest of the case that it would work injustice to throw out his entire testimony. A witness's personal assumptions may be false, while his narration of external objects may be true.⁵ He may state some points connected with his own history falsely; he may even swear falsely as to his own relation to the case, yet in other respects he may be accurate. To cross-examinations these observations are peculiarly applicable. A witness, whom it may be attempted to disgrace, may swear falsely as to some sore point which may be touched, yet truly as to the rest of the case. On account of such falsity it would be a perversion of justice to reject the rest of his evidence. It may be proper to punish the witness for his perjury; it would not be proper to punish the party innocently calling the witness by refusing to believe what was true in the witness's testimony. Nor would it be right to tell a jury, who are sworn to determine a case according to the evidence, that they are to reject that which is probably true in the testimony of a witness because that testimony contains something that is probably false. *Falsa demonstratio non nocet*, is a maxim

¹ *Fulton v. Maccracken*, 18 Md. 538; *State v. Cowan*, 7 Ired. 239; *Black v. Black*, 38 Ala. 111. *Infra*, §§ 381-461.

² *Hargraves v. Miller*, 16 Oh. 338; *Stoffer v. State*, 15 Oh. St. 47; *Richardson v. Roberts*, 23 Ga. 215; *Smith v. State*, 23 Ga. 297; *Ivey v. State*, 23 Ga. 576; *State v. Mix*, 15 Mo. 153; *Paulette v. Brown*, 40 Mo. 52; *Brown*

v. R. R. 66 Mo. 588; *Troxdale v. State*, 9 Humph. 411. Mr. Webster, in his speech on the impeachment of Judge Prescott, pressed this point to its extremest limit. See 5 Webster's Works, 540.

³ *Evans v. Lipscourt*, 31 Ga. 71.

⁴ See *State v. Brown*, 76 N. C. 222; *Pierce v. State*, 53 Ga. 365.

⁵ Whart. on Ev. § 412.

of universal application, so far as it means that we may reject as surplusage a false description that is not vital to the object of controversy.¹ Hence it is that the maxim, *Falsum in uno, falsum in omnibus*, does not hold good except in cases where the party calling the witness is cognizant of the falsehood, or where the falsehood goes to the core of the witness's testimony.² The maxim is wholly without force in cases where the misstatement is inadvertent, or attributable to the ordinary fluctuations of memory.³ Nor, when we undertake to test credibility by this standard, should we fail to remember that even the most conscientious witnesses, as has just been stated,⁴ may not only forget, but unconsciously misstate details.⁵

¹ Broom's Legal Maxims, 629; and see for other points Whart. on Ev. § 945.

² See, generally, authorities cited in Whart. on Ev. § 412; and see *State v. Brantley*, 63 N. C. 518; *State v. Brown*, 76 N. C. 222; *People v. Strong*, 30 Cal. 151.

³ *Brennan v. People*, 15 Ill. 511; *State v. Peace*, 1 Jones (N. C.), 251; *State v. Elkins*, 63 Mo. 159; *Yoes v. State*, 9 Ark. 42; and other cases cited Whart. on Ev. § 412. Compare observations, *supra*, § 378; *Jackson v. McVey*, 18 Johns. 330.

⁴ *Supra*, § 378.

⁵ The position in the text may be illustrated by the following, which I translate from Klopp's *Fall des Hauses Stuarts*, vol. viii. p. 210, Vienna, 1879: Count Christopher Dohna was in 1698 the ambassador from Brandenburg in London. He was a distant relation of the king (William III.) and was a person of much prominence. He subsequently wrote memoirs of his life, not for publication, but for the instruction of his children. This fact, in connection with the character of the writings themselves, goes to show the writer's freedom from intentional falsification. In these memoirs he gives us the following: "I notice

here a confidential communication, which I would have regarded as a fable had it come to me from a less serious man than Ouwerkerke, affirmed as it was by Albemarle and Schomberg. . . . One morning as I was at the court I found Ouwerkerke (then known as a confidential servant of William III.) remarkably silent, like his master, who also seemed to me peculiarly depressed and thoughtful. I could not refrain from asking Ouwerkerke if they had bad news — 'very bad,' was the reply. 'I know your attachment to my master, who regards you very differently from a mere foreign minister. I know also your discretion, therefore I disclose to you the reason: The General of the Order of the Jesuits is dead!' As he saw that I seemed to look upon this as a jest, he added, 'This is neither a mystification nor a joke. You will be astonished when I tell you that this high officer was one of the best friends of the king; that they stood in constant correspondence; and that the king was in the habit of receiving from him important information, as to the safety both of himself and of his kingdom.' I confess (so Dohna adds) that this communication greatly surprised me, and I have

§ 381. "Substantial unity with circumstantial variety" is the true test of reliable testimony ;¹ and the circumstantial variety increases in proportion to the comprehensiveness with which details were noticed by the witnesses

Literary co-
incidence
of oral
statements

no doubt that many who read this will regard it as a dream. The case is nevertheless as I state it, and I give for my authority a man who was far from being a rash talker, was honorable and reliable, whose relations to me were friendly, and who would have been far from rewarding my attachment to his king by palming off on me unfounded statements." Upon this Klopp, himself a sincere Roman Catholic, who writes with the aid of the Vatican papers, and whose work has attached to it a recommendatory letter from the pope, makes the following remarkable comment: "As to the subjective truth of this statement there can be no doubt (i. e. as to Dohna's belief he was telling the truth). It is otherwise, however, when we come to examine the facts. No General of the Jesuits died during the reign of William III., Noyelle dying in 1686, before that reign began, and Gonzalez in 1705, after it ended. *Nor is there any trace of any correspondence with William in the archives of the order.* But we cannot on this ground reject *in toto* the statement of Count Dohna. *This would be doing injustice to a man of whose candor the entire book has internal evidence.* As his memorials were written many years after the events they narrated, it is probable that the name of the General of the Jesuits was given by mistake for that of a head of one of the other orders at Rome. The words of Innocent XII., already given, show that at that time at Rome William III. had many friends."

With regard to a witness denying the existence of certain facts which

are proved *aliunde* to be part of the transaction he undertakes to narrate, the following observations of Mr. James Mill may be cited:—

"A remarkable piece of natural scenery, composed of mountains, woods, rivers, lakes, ocean, flocks, herds, cultivated fields, gay cottages, and splendid palaces, of which I had a lively recollection many years ago, presents itself to me now very much faded; in other words, a great variety of the circumstances, which make up the detail and minute features of the scene were formerly remembered by me, but are now forgotten. And how forgotten? The manner is obvious. The greater features, which I still remember, had formerly the power of calling up the smaller along with them, and the whole scene was revived; the association gradually declining, the great objects have no longer the power to excite the idea of the small; and they are therefore gone from me forever." 1 Mill on Human Mind, 332.

Now few writers have been more anxiously conscientious in their statements of facts than Mr. James Mill; yet we find him here asserting that certain details in a scene he recalls are, after a lapse of time, "gone forever." Suppose Mr. Mill to be on the witness stand, testifying to a past occurrence, and suppose the question were put to him, "Was A. present?" and the answer given, "He was not," which answer turns out to be untrue; is this a case to which the maxim, *Falsus in uno, falsus in omnibus*, could be applied?

¹ Paley's Evidence, part iii. c. i.; Brougham's Speeches, i. 245.

examined, and the copiousness with which these details are narrated. As to *substance*, harmony is one of the conditions of truth; as to *form*, wherever there are truth and liberty, there is variety.

§ 382. Testimony, even by a series of witnesses, that they did not see a thing happen which may have happened in the ordinary course of events, at a moment when no one of these witnesses was present, cannot outweigh the testimony of a single reliable witness that he saw the event happen at a time when no one of the others was present.¹ The testimony of a series of witnesses, for instance, that they never saw a party drunk, does not outweigh the testimony of others to the fact of his drunkenness on particular occasions, unless those speaking to the negative cover the same point of time as those speaking to the affirmative.² The weight to be attached to negative witnesses depends upon the exhaustiveness of their observation.³ Put an intelligent and credible witness in a small chamber, open throughout to his scrutiny, and his testimony that in that chamber, at a given time, an event did not occur which could not have occurred without his observation, is entitled to the same weight with that of a witness who, equally intelligent and credible, should swear to the occurrence of the event at the same time.⁴ A negative witness, also, whose attention is concentrated on a particular point, may outweigh an affirmative witness whose attention has not been so concentrated.⁵ On the other hand, as the space covered by a negative witness

a ground
for sus-
picion.

Affirma-
tive testi-
mony is
stronger
than nega-
tive.

¹ *Stitt v. Huidekopers*, 17 Wall. 384; *Coughlin v. People*, 18 Ill. 266; *State v. Gates*, 20 Mo. 400; *Ralph v. R. R.* 32 Wis. 177; *Johnson v. State*, 14 Ga. 55; *Todd v. Hardie*, 5 Ala. 698; *Pool v. Devers*, 30 Ala. 672; *Hepburn v. Bk. 2 La. An.* 1007; *Auld v. Walton*, 12 La. An. 129; *Coles v. Perry*, 7 Tex. 109.

² *Murphy v. People*, 90 Ill. 59.

³ That a negative may be proved see *supra*, § 321.

⁴ See cases cited in *Whart. on Ev.* § 415.

It has been ruled that the state-

ment of a witness, who was very wakeful, and who slept in the room with the defendant, and who saw him go to bed that night and rise the next morning, that the defendant could not have left the room that night, is inadmissible, as matter of opinion. *Bennett v. State*, 52 Ala. 371. The proper ground of exclusion in such a case, however, would be irrelevancy; *Chambers v. Hill*, 34 Mich. 523; though ordinarily the objection would go to weight and not to admissibility.

⁵ *Reeves v. Poindexter*, 8 Jones (N. C.), 308.

becomes undetermined, his testimony loses in weight.¹ Yet this objection goes to weight, not to admissibility.²

§ 383. Two witnesses, all other things being equal, are less likely to be mistaken than one,³ and from this the conclusion is sometimes drawn that the weight of testimony as to a contested fact is to be determined by the number of the witnesses testifying. But witnesses cannot be treated as units, to be divested of their own distinctive claims to credit. It may well happen that one intelligent and honest witness may outweigh several who are ignorant or unreliable.⁴ Nor should it be forgotten that one witness, corroborated by facts or documents, may outweigh a multitude whose testimony may have been the result of imperfect observation, or have been influenced by prejudice.⁵

§ 384. Credibility is, therefore, a matter of induction, to be determined by the jury, under such instructions, as to the reason of the case, as may be given by the court,⁶ and the presumptions usually invoked in this relation are presumptions of fact, based on free logic, and are not presumptions of technical law.⁷ It need scarcely be added that the importance of applying psychological tests, resting on the motives which may lead a witness to deceive, or the character which deprives him of trustworthiness, is enhanced by the statutory removal of disqualification from interest, from infamy, and from atheism.

§ 384 a. When the court is satisfied that a witness is so drunk as to be unable to testify, he may be excluded, or his examination postponed until he is sober;⁸ though, to exclude a witness, it is not sufficient that he has been found to be a habitual drunkard under the statute.⁹ To impeach

¹ *Abel v. Fitch*, 20 Conn. 90; *Thomas v. De Graffenreid*, 17 Ala. 602. See *Matthews v. Poythress*, 4 Ga. 287.

² *State v. Phair*, 48 Vt. 366.

³ See *Dowdell v. Neal*, 10 Ga. 148.

⁴ *Cockburn*, C. J., in *Tichborne* case; *M'Lees v. Felt*, 11 Ind. 218; *Glenn v. Bank*, 70 N. C. 191; *Boylston v. Bain*, 90 Ill. 283. See *Sanborn v. Babcock*, 33 Wis. 400.

⁵ See *supra*, § 10; and see *McCrum*

v. Corby, 15 Kans. 112; *Parrish v. State*, 45 Tex. 51.

⁶ See *Kinner v. State*, 45 Ind. 175; *Jones v. State*, 48 Ga. 163.

⁷ *Whart. on Ev.* §§ 124, 417. Among these presumptions may be noticed those drawn from the witness's manner. *Infra*, § 751.

⁸ *Hartford v. Palmer*, 16 Johns. 43; *Gould v. Crawford*, 2 Barr, 89; *State v. Underwood*, 6 Ired. 96.

⁹ *Gebhart v. Shindle*, 15 S. & R. 2.

credibility, drunkenness at the time of the event testified to may be proved.¹ Evidence of the use of opium cannot be introduced to impair credit, unless it be shown that the witness was under the influence of opium when examined, or that his powers of observation or recollection were affected by the habit.²

§ 385. So far as concerns the question of technical competency, a lawyer concerned in a case cannot be excluded from the witness-box on account of his professional connection with the case; though it has been held that he may in the discretion of the court be precluded from recklessly and unnecessarily uniting the functions of counsel and witness.³ The mere fact that the case has been opened by an attorney, who has previously cross-examined witnesses on the other side, does not make him incompetent as a witness for his client.⁴ Where, however, counsel thus become witnesses, it may be a proper exercise of the discretion of the court to prohibit them from subsequently addressing the jury on the case thus made up; and the testifying of the counsel should be confined to extreme cases where there is no other proof.⁵

Privilege in professional communications is hereafter considered.⁶

V. NUMBER OF WITNESSES NECESSARY.

§ 386. In high treason, at common law, two witnesses are required, both before the grand jury and at the trial; both of the witnesses to be to the same overt act, or one of them to one overt act and another of them to another overt act of the same species of treason.⁷ If the jury do not give credit to both of the witnesses, the defendant must

Compare authorities cited *supra*, § 378.

¹ *Duffy v. Com.* S. C. Penn. 1878. *Supra*, § 369.

² *Supra*, § 378; *McDowell v. Preston*, 26 Ga. 528. As to insane witnesses see *supra*, § 370; *infra*, § 399.

³ *State v. Cook*, 28 La. An. 347. See *Tilton v. Beecher*, Pamph. Rept., for an illustration of a case in which such testimony was admitted.

⁴ *Follansbee v. Walker*, 72 Penn. St. 228.

⁵ See *Cobbett v. Hudson*, 1 E. & B. 11; *Ross v. Demoss*, 45 Ill. 447; *Madden v. Farmer*, 7 La. An. 580; *Boissy v. Lacou*, 10 La. An. 29. As to Georgia statute, excluding attorneys from testifying for their clients, see *Churchill v. Corker*, 25 Ga. 479; *Hines v. State*, 26 Ga. 614; *Sharman v. Morton*, 31 Ga. 34.

⁶ *Infra*, § 496.

⁷ 7 & 8 W. 3, c. 3, s. 2; 1 Ed. 6, c. 12, s. 22; 5 & 6 Ed. 6, c. 11, s. 12. *Whart. Crim. Law*, 8th ed. § 1808.

be acquitted.¹ But even one witness, in England, is sufficient to prove a collateral fact;² as, for instance, to prove that the defendant is a natural born subject,³ or the like. In this country, although the Constitution declares that two witnesses to the same overt act are necessary to produce conviction, it has been intimated that while there must be two witnesses on trial to some particular overt act in order to secure a conviction, yet with the grand jury it is enough that one witness prove one act, and another prove another act, or that there be one witness to an overt act with corroborating circumstances.⁴

§ 887. The old text-writers, adopting the then current distinction between "circumstantial" and "direct" testimony, held that to convict a witness of perjury, it was necessary that the falsity of his sworn statement should be testified to by two "direct" witnesses.⁵ In view of the fact, however, that all testimony is now considered more or less circumstantial, this rule can be no longer regarded as operative; and we may view it as settled that whenever the falsity of the defendant's statement can be proved beyond reasonable doubt, then there may be a conviction.⁶ Hence the testimony of a witness to falsity is sufficiently sustained by a written admission of the defendant.⁷ But the corroboration must go beyond slight and indifferent particulars.⁸ The preponderance of contradictory proof

¹ Per Scroggs, C. J., in *R. v. Palmer*, 3 St. Tr. 56.

² Fost. 242; Whart. Crim. Law, 8th ed. § 1808.

³ *R. v. Vaughan*, 5 St. Tr. 29.

⁴ *Burr's Trial*, 196; *U. S. v. Hanway*, 2 Wall. Jr. 139. *Contra*, *Iredell, J., Fries' case*, Wh. St. Tr. 480. See *R. v. McCafferty*, 1 Irish R. C. L. 365; 10 Cox C. C. 603.

⁵ 1 Starkie Ev. 443; 4 Hawk. P. C. b. 2, c. 46, s. 10; 4 Bl. Comm. 358; 2 Russ. on Cr. 1791; *R. v. Muscot*, 10 Mod. 195. See *Laughran v. Kelly*, 8 Cush. 199.

⁶ *R. v. Boulter*, 2 Den. C. C. 396; 5 Cox C. C. 543; *R. v. Roberts*, 2 C. & K. 607; *R. v. Gardner*, 8 C. & P. 737; *Champney's case*, 2 Lew. C. C.

258; *R. v. Braithwaite*, 8 Cox C. C. 254; 1 F. & F. 639; *R. v. Hook*, 8 Cox C. C. 5; *U. S. v. Wood*, 14 Pet. 440; *Woodbeck v. Keller*, 6 Cow. 118; *Crusen v. State*, 10 Ohio St. 258; *Hendricks v. State*, 26 Ind. 493; *State v. Raymond*, 20 Iowa, 582; *State v. Hayward*, 1 N. & McC. 547; *State v. Molier*, 1 Dev. 263. See Whart. Crim. Law, 8th ed. § 1319.

⁷ *R. v. Mayhew*, 6 C. & P. 315, per Lord Denman, C. J.; *R. v. Hook*, 8 Cox C. C. 5; *U. S. v. Wood*, 14 Pet. 430; *State v. Molier*, 1 Dev. 263.

⁸ *R. v. Yates*, C. & M. 139; *Simmons v. Simmons*, 11 Jur. 830; *R. v. Boulter*, 2 Den. C. C. 396; 5 Cox C. C. 543; 3 C. & K. 236; *Dodge v. State*, 4 Zab. 455.

must go to some one particular false statement. It will not be sufficient to prove by one inadequate line of testimony that one statement made by the defendant is false, and then by another inadequate line of testimony that another statement made by him is false.¹ One witness is sufficient to prove that the witness swore as alleged in the indictment.²

§ 388. From civil issues, we can get but little light in the present inquiry, since in civil issues, with but few ex-
ceptions, a case can be made out by a single witness. In bas-
tardy.

In cases of bastardy, however, it is necessary, to sustain an order of affiliation, that the evidence of the mother should be corroborated, in some material particular, by other testimony.³

§ 389. In divorce cases, the testimony of a party, uncorroborated, has been held insufficient to establish adul-
tery.⁴ It should at the same time be remembered that In divorce
cases. we have derived this limitation from the English ecclesiastical courts, whose jurisdiction is now reduced almost to a nullity, and whose judges considered themselves bound by canon law to refuse a decree upon the testimony of a single witness, unless supported by "adminicular circumstances."⁵ "This doctrine was in former days productive of much injustice;"⁶ and is now abandoned, even as to divorce cases, by the statutory prescription of the rules of evidence observed in the superior courts of common law.⁷ In this country, while the limitation was never accepted as absolute,⁸ the better opinion, as is elsewhere stated, is, that whenever corroboration is from the nature of the case practical, there a divorce will not be granted on the unsupported testimony of a party.⁹

¹ *R. v. Virrier*, 12 A. & E. 317; *Hays*, 19 Wis. 182; *Fugate v. Pierce*,
R. v. Parker, C. & M. 639. See 49 Mo. 446.
Whart. Crim. Law, 8th ed. §§ 1317-21.

² *Whart. Crim. Law*, 8th ed. § 1308.

³ *R. v. Roberts*, 2 C. & K. 614; *Hays*, 19 Wis. 182; *Fugate v. Pierce*,
Hodges v. Bennett, 5 H. & N. 625; 49 Mo. 446.
R. v. Read, 9 A. & E. 619.

⁴ *Thayer v. Thayer*, 101 Mass. 111; *Tate v. Tate*, 26 N. J. Eq. 55; *Black*
r. Black, 26 N. J. Eq. 431; *Bronson v. Bronson*, 8 Phila. 261; *Hays v.*
Hays, 19 Wis. 182; *Fugate v. Pierce*, 49 Mo. 446.

⁵ See *Taylor's Ev.* § 883, citing
Donellan v. Donellan, 2 Hagg. Ecc.
R. 144; *Simmonds v. Simmonds*, 5 Ec.
& Mar. Cas. 324; *Hutchins v. Denzi-*
loe, 1 Const. R. 181.

⁶ *Taylor's Ev.* § 883.

⁷ See *U., falsely called T., v. J., L.*
R. 1 P. & D. 461.

⁸ *Bishop, Mar. & Div.* § 278. See
Flattery v. Flattery, 88 Penn. St. 27.

⁹ See *Whart. on Ev.* § 433.

VI. HUSBAND AND WIFE.

§ 390. Where the relation of husband and wife under the local law makes either incompetent as a witness for or against the other, it is necessary, to work such incompetency, that a valid marriage should be proved. *Primâ facie* every person is competent to testify in all issues; if he is to be excluded by the policy of the law, the burden is on the party objecting to him to show the reason for such exclusion.¹ Intimate sexual relations do not constitute such reason, even though disguised by a pretended but invalid marriage;² and where a man and a woman lived, as they supposed, as husband and wife, but separated in consequence of the woman's discovering that a former husband, believed to be dead, was still alive, it was held that the woman was a competent witness against the man with whom she thus lived as a second husband, even as to facts she learned from him during their cohabitation.³ For when a former existing marriage is conceded, no subsequent marriage, no matter how solemn, can operate to divest the parties to such subsequent invalid marriage of their privilege as witnesses for or against each other.⁴

Privilege as to marital communications is hereafter discussed. *Infra*, § 398.

¹ *Dove v. State*, 3 Heisk. 348.

² *Batthews v. Galindo*, 4 Bing. 610; S. C. 3 C. & P. 238; *Campbell v. Twemlow*, 1 Price, 31; *Divoll v. Leadbetter*, 4 Pick. 220; *Dennis v. Crittenden*, 42 N. Y. 542; *People v. McCraney*, 6 Parker C. R. 49; *State v. Taylor*, Phill. (N. C.) 508; *Hill v. State*, 41 Ga. 484; *State v. Brown*, 28 La. An. 279; *Flanagin v. State*, 25 Ark. 92; *Rickerstriker v. State*, 31 Ark. 207; *Mann v. State*, 44 Tex. 642.

³ *Wells v. Fletcher*, 5 C. & P. 12; *People v. McCraney*, 6 Parker C. R. 49.

⁴ *R. v. Serjeant*, Ry. & M. 354; *R. v. Jones*, C. & M. 614; *R. v. Madden*, 14 Up. Can. Q. B. 588; *State v. Pat-*

terson, 2 Ired. 346; *Finney v. State*, 3 Head (Tenn.), 544; *State v. Johnson*, 12 Minn. 476.

It is said that Lord Kenyon once rejected a woman, called as a witness for a putative husband, to whom she was never married, but who acknowledged her as his wife; *Anon.*, cited by Richards, B., in 1 Price, 83; but in that case the criminal had, *throughout the trial*, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned; and in the subsequent case of *Batthews v. Galindo*, 4 Bing. 610, 612, 613; 3 C. & P. 238, and 1 M. & P. 565, S. C., where Lord Kenyon's ruling was discussed, Park and Burroughs, JJ., declared that his decision was founded on this admission, and the whole court determined that a kept

Marriage, however, being proved, neither husband nor wife is competent at common law to testify in a suit for or against the other.¹ Thus a husband is incompetent in a prosecution against

mistress was a competent witness for her protector, though she passed by his name and appeared to the world as his wife. The same view was afterwards taken even as to confidential communications between persons untruly believing themselves husband and wife; though in the latter case the parties had separated before the trial, on hearing that a former husband of the woman was still alive. *Wells v. Fletcher*, 5 C. & P. 12, per Patteson, J.; S. C., *nom. Wells v. Fisher*, 1 M. & Rob. 99, and n. It seems, also, from this last case, and from several others; *R. v. Peat*, 2 Lew. C. C. 288; *R. v. Wakefield*, *Ibid.* 279; 1 Russ. C. & M. 218, n. t; that a supposed husband or wife may be examined on the *voir dire* to facts showing the invalidity of the marriage; and it is apprehended that no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony; *R. v. Bramley*, 6 T. R. 330; *R. v. Bathwick*, 2 B. & Ad. 646, where Lord Tenterden observed, "that it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called." Taylor's Ev. § 1231.

Where one of two prisoners had married his deceased wife's sister, it was held in England, such marriage being there void, that she was a competent witness against him upon his trial. *R. v. Young*, 5 Cox C. C. 296 — Erle.

¹ *R. v. Smith*, 1 Mood. C. C. 289; *R. v. Payne*, 12 Cox C. C. 118; State

v. Welsh, 26 Me. 30; *Kelley v. Proctor*, 41 N. H. 139; *Blain v. Patterson*, 48 N. H. 151; *Manchester v. Manchester*, 24 Vt. 649; *Seargent v. Seward*, 31 Vt. 509; *Com. v. Marsh*, 10 Pick. 57; *Lucas v. State*, 23 Conn. 18; *Wilke v. People*, 53 N. Y. 525; *Copous v. Kauffman*, 8 Paige, 583; *Hasbrouck v. Vandervoordt*, 9 N. Y. 153; *Bird v. Davis*, 14 N. J. Eq. 467; *Snyder v. Snyder*, 6 Binn. 488; *Pringle v. Pringle*, 59 Penn. St. 281; *Gibson v. Com.* 87 Penn. St. 253; *Miller v. Williamson*, 5 Md. 219; *Corse v. Patterson*, 6 Har. & J. 153; *Steen v. State*, 20 Oh. St. 333; *Kyle v. Frost*, 29 Ind. 382; *Taulman v. State*, 37 Ind. 353; *Mountain v. Fisher*, 22 Wis. 93; *Osborn v. Black*, Speers (S. C.), 431; *William v. State*, 33 Ga. (Sup.) 85; *Williams v. State*, 44 Ala. 24; *Tulley v. Alexander*, 11 La. An. 628; *State v. Berlin*, 42 Mo. 572; *Smead v. Williamson*, 16 B. Mon. 492; *Gilkey v. Peeler*, 22 Tex. 663; *Whitehead v. Foley*, 28 Tex. 268; *Overton v. State*, 43 Tex. 616.

In *R. v. Perry*, per Gibbs, C. J., cited and approved of by Abbott, C. J., in *R. v. Serjeant*, Ry. & M. 354, a husband was deemed an inadmissible witness in support of a prosecution, which charged his wife and several other persons with conspiring to procure his marriage without consent of his parents; and where four men were indicted for sheep-stealing, Baron Bolland rejected the testimony of the wife of one of them, who was called to prove facts against the other prisoners. *R. v. Webb*, 2 Russ. on Cr. 982. See 1 Hale, 301.

"It seems highly questionable, however," says Mr. Taylor, "whether

his wife for her adultery, and so, *mutatis mutandis*, is the wife against the husband ;¹ but if the paramour be prosecuted singly, it is held that the restriction does not continue in force.²

§ 391. Wherever a defendant is incompetent to testify for or against a co-defendant, then the husband or wife of such person is to the same extent incompetent.³ Thus, on a trial for conspiracy, the wife of one of the defendants should not be allowed to testify against one of the others, as to any act done by him in furtherance of the common design, if there be any evidence given connecting the husband with the defendants in the general conspiracy.⁴ And on an indictment against several defendants, for a conspiracy to charge the wife of one of them with adultery, such wife is not a competent witness for the prosecution.⁵ But where a co-defendant is admissible his wife is admissible.⁶

§ 392. But where the grounds of defence are several and distinct, and in no way dependent on each other, as is observed by Mr. Greenleaf, "no reason is perceived why the wife of one defendant should not be admitted as a witness for another ;"⁷ and where the acquittal of one defendant does not necessarily involve the acquittal of the other, the wife of one defendant, where the trials are separate, may be a witness for the other.⁸ Thus where H., D., S., Z., and T. were jointly indicted for murder,

this last decision does not outstep the bounds of law."

¹ State v. Welch, 26 Me. 80; Com. v. Sparks, 7 Allen, 534; State v. Gardner, 1 Root, 485; State v. Berlin, 42 Mo. 572; *contra*, State v. Bennett, 31 Iowa, 24.

² State v. Marvin, 35 N. H. 22.

³ *Infra*, § 445; R. v. Smith, 1 Mood. C. C. 289; R. v. Hood, 1 Mood. C. C. 281; R. v. Payne, 12 Cox C. C. 118; R. v. Thompson, L. R. 1 C. C. 379; U. S. v. Hanway, 2 Wall. Jr. 139; Com. v. Robinson, 1 Gray, 555; Com. v. Reid, 8 Phil. 385; State v. Smith, 2 Ired. 402; State v. McGrew, 13 Rich. 316; Johnson v. State, 47 Ala. 9; Mask v. State, 22 Miss. 405.

⁴ R. v. Serjeant, 1 R. & M. 352, and cases cited *infra*, § 392.

⁵ State v. Burlingham, 3 Shep. 104; Johnson v. State, 47 Ala. 9.

⁶ Blackburn v. Com. 12 Bush, 481. See Ray v. Com. 12 Bush, 397.

⁷ 1 Greenl. on Ev. § 335.

⁸ U. S. v. Addatte, 6 Blatch. 76; Com. v. Easland, 1 Mass. 15; Com. v. Manson, 2 Ashm. 33; Com. v. Reid, 8 Phil. 385; Com. v. David, 8 Phil. 611; State v. Mooney, 64 N. C. 54; Powell v. State, 58 Ala. 362; State v. Anthony, 1 McCord, 286; Cornelius v. Com. 3 Metc. (Ky.) 481; though see Pullen v. People, 1 Dougl. 48; Workman v. State, 4 Sneed, 425; State v. Burnside, 37 Mo. 343.

and a separate trial awarded to T., and upon the trial of T. he offered to prove an *alibi* by the wives of H. and S., it was held that they were competent witnesses. The court, after reviewing the authorities upon the question, said: "The mere fact that the husband is a party to the record does not of itself exclude the wife as a witness on behalf of the other parties, but the rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife."¹ Where, also, a married defendant has pleaded guilty,² or is entirely removed from the record, whether by a verdict pronounced in his favor, or by a previous conviction, his wife may testify either for or against any other persons who may be parties to the record;³ and the mere hope that, by testifying against a prisoner, a wife may procure the pardon of her husband, who has been previously convicted of another crime, will not affect her competency, though it may shake her credit.⁴ But where the offence is such that the acquittal of one defendant is the acquittal of the other (*e. g.* adultery, as well as riot and conspiracy), then the husband or wife of one of the parties is, under any circumstances, incompetent.⁵

The wife of a prosecutor is not precluded by this rule from giving evidence either for the prosecution or for the defendant.⁶

§ 393. Where, however, violence has been committed on the person of the wife by the husband, she is competent to prove such violence.⁷ Hence on the trial of a man for the murder of his wife, her dying declarations are evidence against him.⁸ And in all cases of personal injuries

Exception
in case of
violence.

¹ *Thompson v. Com.* 1 Metc. (Ky.) 13; *Cornelius v. Com.* 3 Metc. (Ky.) 481; *Workman v. State*, 4 Sneed, 425.

² *R. v. Thompson*, 3 F. & F. 824, per Keating, J.

³ *Hawkesworth v. Showler*, 12 M. & W. 49, 50, per Alderson, B.; *R. v. Williams*, 8 C. & P. 284, per Id., who stated that, in *Thurtell's case*, Mrs. Probett was examined as the principal witness against *Thurtell* after her husband was acquitted.

⁴ *R. v. Rudd*, 1 Leach, 127.

⁵ *Com. v. Gordon*, 2 Brewst. 569; *Mask v. State*, 31 Miss. 405. See *Whart. Cr. Pl. & Pr.* § 873.

⁶ See *R. v. Houlton*, 1 Jebb C. C. 24; *Taylor's Ev.* § 1230, from which the above is taken.

⁷ *Audley's case*, 4 St. Tr. 402; *R. v. Wasson*, 1 Craw. & D. 197; *R. v. Serjeant*, R. & M. 352; *U. S. v. Smallwood*, 5 Cranch C. C. 35; *Murphy v. Com.* 4 Allen, 491; *People v. Fitzpatrick*, 5 Parker C. R. 2.

⁸ *Woodcock's case*, 1 Leach C. C. 500; *John's case*, 1 East P. C. 357;

committed by the husband or wife against each other, the injured party is an admissible witness against the other.¹ Thus the husband may be a witness against the wife when she is prosecuted for assaulting him.² The wife may be a witness against the husband on a prosecution against him for attempting to poison her;³ and for being concerned in attempting on her a miscarriage. On this rule, however, the Supreme Court of North Carolina has grafted the qualification that the assault must amount to an attempted felony, or cause lasting injury, or great bodily harm.⁴ And it is plain that in cases not involving per-

Soulis's case, 5 Greenl. 407; *State v. Boyd*, 2 Hill, 288; *Resp. v. Hevice*, 2 Yeates, 114; *Penn. v. Stoops*, Addison, 382; 1 Phil. Evid. 75, n. 1.

¹ *R. v. Jagger*, 1 East P. C. 455; *R. v. Pearce*, 9 C. & P. 667; *People v. Mercein*, 8 Paige, 47; *State v. Davis*, 8 Brev. 3; *Hampton v. State*, 45 Ala. 82.

² *Whipp v. State*, 34 Oh. St. 87.

³ *R. v. Jagger*, 1 East P. C. 455; *R. v. Wasson*, 1 Craw. & Dix, 197.

⁴ *State v. Hussey*, 1 Busbee, 123. In this case, Nash, C. J., said: "Mr. Greenleaf, 1st vol. § 343, in enumerating the cases in which a wife may be examined as a witness, states some which are for felonies, or acts leading to felonies, and refers to one for assault and battery on her. For this he refers to Azire's case, 1 Strange, 633, where it is reported in about as many words as Mr. Greenleaf has used in stating the principle. Nothing is said of the facts, or the nature and extent of the assault and battery, and for it is only cited Lord Audley's case, which was for an atrocious felony upon her person. Now it is utterly impossible that the principle can be true, as stated. We know that a slap on a cheek, let it be as light as it may, indeed any touching of the person of another in a rude or angry manner, is in law an assault and bat-

tery. In the nature of things, it cannot apply to persons in the marriage state; it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign. It must be remembered that rules of law are intended to act in all classes of society. In Sedgwick v. Watkins, 1st Ves. Jun. 49, which was an application of a wife for a *ne exeat* against her husband, Lord Thurlow said: 'She may make application for it, but the question is, by what evidence she can support it; and whether her affidavit can be read to affect her husband?' He admits that for security of the peace *ex necessitate rei*, she may make an affidavit against her husband, but cannot be a witness to sustain an indictment, and closes by observing, 'I have always taken it to be a rule, that a wife never can be a witness against her husband, except in the case I have alluded to.' The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband for felonies perpetrated, or attempted to be perpetrated on her, and we would say for an assault and battery which inflicted or threatened a lasting injury or great bodily harm; but in all cases

sonal injury the wife cannot, at common law, be called against her husband.¹

§ 394. If a woman be taken away by force and married, she may be a witness against her husband, indicted on stat. 9 Geo. 4, c. 31, s. 19, against the stealing of women; for a contract obtained by force has no obligation in law.² So in abduction and rape. So upon an indictment on the same act, section 22, for marrying a second wife, the first being alive, though the first cannot be a witness,³ yet the second may after proof of the first marriage, the second marriage being void.⁴ In Lord Audley's case, his wife was allowed to be a witness to prove that he assisted in a rape upon her.⁵

§ 394 a. In all cases where husband and wife are admissible against each other they are admissible for each other.⁶ Thus, on an indictment of a husband for an assault

So in abduction and rape.

When admissible against

of a minor grade she is not. In this case, there is no pretence that any lasting injury was inflicted; on the contrary, the case states that the injury was temporary." And in this State it is now settled that a wife is not a competent witness against her husband "for an assault and battery on her where no lasting injury is inflicted or threatened to be inflicted upon her," and the same rule, *mutatis mutandis*, is applied to the husband. *State v. Rhodes*, Phil. (N. C.) 453; *State v. Oliver*, 70 N. C. 60; *State v. Davidson*, 77 N. C. 522. *Contra*, U. S. v. Smallwood, 5 Cranch C. C. 35.

¹ *People v. Carpenter*, 9 Barb. 580; *Com. v. Jailer*, 1 Grant, 218; *Steen v. State*, 20 Oh. St. 333; *State v. Berlin*, 42 Mo. 572.

² *R. v. Reading*, Hardw. 73; B. N. P. 286; Whart. Crim. Law, 8th ed. § 587.

"In a case before Mr. Baron Hulloek, where the defendants were charged in one count with a conspiracy to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause

her to marry one of the defendants; and in another count with conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; the learned judge was of opinion that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of necessity, although there was no evidence to support that part of the indictment which charged force; and also on the ground that the latter defendant, by his own criminal act, could not exclude such evidence against himself. *R. v. Wakefield*, 257, Murray's ed.; 2 Russ. 605; 2 Stark. Ev. 402 (n.), 2d ed." Roscoe's Cr. Ev. 126.

³ *Williams v. State*, 44 Ala. 24.

⁴ *Griggs's case*, Sir. T. Raym. 1; 4 St. Tr. 754; B. N. P. 287; 2 Hawk. c. 46, s. 72; R. & M. 354.

⁵ 1 St. Tr. 393; and see 1 Hale P. C. 301; 1 Phil. 84.

⁶ *R. v. Serjeant*, R. & M. 352; *People v. Fitzpatrick*, 5 Parker C. R. 26.

admissible
for each
other.

and battery on his wife, she is a competent witness for him to disprove the charge.¹

But may
be a wit-
ness to
prove mar-
riage col-
laterally.

§ 395. While to test competency either the man or the woman may be examined on the *voir dire* as to marriage,² to establish the marriage, proof *aliunde* must be adduced. The reasoning is simply this: if the marriage is valid, the witness is not competent; admitting that which he is offered to prove, then he is incompetent as a witness in the suit. This conclusion, however, does not apply to settlement cases or collateral inquiries.³ Thus it has been held in Pennsylvania, that a woman is a competent witness to prove the contract of marriage in a proceeding by the guardians of the poor to compel the alleged husband to contribute to her support.⁴ To invalidate a second marriage collaterally, by proving the existence of a first marriage, either party is competent.⁵

Husband
and wife
cannot be
compelled
collaterally
to crim-
inate each
other.

§ 396. The mere fact that the testimony to be given by a wife criminales her husband, or that the testimony of the husband criminales the wife, does not exclude such testimony in prosecutions in which the party so criminated is not a defendant.⁶ Yet while such testimony will be *admitted*, it will not be *compelled*,⁷ though an

¹ Com. v. Murphey, 4 Allen, 491; State v. Neill, 6 Ala. 685, and cases cited supra.

² Seeley v. Engell, 13 N. Y. 542.

³ R. v. Peat, 2 Lew. C. C. 288; R. v. Bramley, 6 T. R. 330; R. v. Bathwick, 2 B. & Ad. 646; R. v. Bienvenu, 15 Low. C. J. 181; Scherpf v. Szadeczy, 4 E. D. Smith. 110; Redgrave v. Redgrave, 38 Md. 93; Williams v. State, 44 Ala. 24. In New York, however, under the statute permitting a wife to testify in matters affecting her husband, she may testify in her own behalf, in a suit of divorce brought by her, to prove a marriage. Bissell v. Bissell, 55 Barb. 325. But at common law, either husband or wife may

be a witness to prove marriage collaterally in all cases in which proof of the marriage would not make the witness incompetent. Willis v. Underhill, 6 How. N. Y. (Pr.) 396.

⁴ Guardians of the Poor v. Nathans, 2 Brewst. 149. See Christy v. Clarke, 45 Barb. 529.

⁵ Shaak's Est. 4 Brewst. 305.

⁶ See Whart. on Ev. § 432; R. v. Bathwick, 2 B. & Ad. 639; R. v. All Saints, 6 M. & S. 194; R. v. Halliday, 8 Cox C. C. 298; Henman v. Dickinson, 5 Bing. 183; State v. Bridgman, 49 Vt. 202; Com. v. Reid, 8 Phila. 609. For other cases see *infra*, § 402.

In Tilton v. Beecher (Abbott's Rep. ii. 48 *et seq.*), Mr. Tilton, the plain-

⁷ Cartwright v. Green, 8 Ves. 405; R. v. All Saints, 6 M. & S. 200; R. v. Williams, 8 C. & P. 284; State v.

Briggs, 9 R. I. 361; Com. v. Reid, 8 Phil. 385. See fully *infra*, § 402.

answer will be required as to matters only disgracing, but not criminating.¹

§ 397. It has been ruled in Canada that on an indictment for bigamy the first wife is inadmissible for the defence to prove that her marriage is invalid.² This, however, is founded on a *petitio principii*. The question is, whether the first marriage is valid. If so, she is not a witness, but she is a witness if such marriage is invalid.

In prosecutions for bigamy lawful wife cannot prove marriage.

For the court to refuse to admit her, when called by the defence, to disprove the marriage, is to prejudge the question in issue.³ That she cannot be called to sustain the marriage is clear, for

tiff (the suit being against Mr. Beecher for damages for criminal conversation with the plaintiff's wife), was offered as a witness to prove his wife's adultery. This was objected to by the defendant's counsel, who, after citing a series of common law authorities, relied on *Chamberlain v. People*, 23 N. Y. 88; *Dann v. Kingdom*, 1 N. Y. Sup. Ct. 492; *Lucas v. Brooks*, 18 Wall. 452; *Rideout's Trusts*, L. R. 10 Eq. 44. In behalf of the plaintiff it was argued that his competency, for this purpose, was established by the statute of 1867. To this effect were cited: *Potter v. Marsh*, 30 Barb. 506; S. C., 24 How. Pr. 610, note; *Wehrkamp v. Willett*, 4 Abb. App. 548, 559; *Potter v. Chamberlain*, 23 N. Y. 85; *White v. Stafford*, 35 Barb. 419; *Card v. Card*, 39 N. Y. 317; *Matteson v. R. R.* 62 Barb. 364; S. C., 35 N. Y. 487; *Petrie v. Howe*, 4 N. Y. Sup. Ct. 85. The court (p. 116) held that the plaintiff was entitled to testify as a witness, but not as to confidential communications from his wife.

In *Dickerman v. Graves*, 6 Cush. 308, a wife, after a divorce from her husband, was held a competent witness for him to prove the fact of adultery in a suit by him against the alleged adulterer. But see *infra*, § 399.

¹ *R. v. Bathwick*, 2 B. & A. 639;

State v. Marvin, 35 N. H. 22; *Com. v. Sparks*, 7 Allen, 534; *State v. Briggs*, 9 R. I. 361; *Ware v. State*, 35 N. J. L. 553; *State v. Dudley*, 7 Wis. 664.

"The question whether a wife is bound to answer questions criminating her husband is not in a satisfactory state. It was held at common law, in *R. v. Claviger*, 2 T. R. 268, that a wife could not be compelled to answer questions criminating her husband. In *R. v. Worcester*, 6 M. & S. 194, Lord Ellenborough held that a wife was competent to answer such questions, and that the answers were not excluded on the ground of public policy; but Bayley, J., was of opinion that a wife who threw herself upon the protection of the court would not be compelled to answer. In equity there is no doubt that a wife cannot be compelled to answer any question which may expose her husband to a charge of felony. *Cartwright v. Green*, 8 Ves. 410." *Powell's Evidence* (4th ed.), 110.

That husband and wife may be admitted to contradict each other see *infra*, § 402.

² *R. v. Madden*, 14 Up. Can. Q. B. 588; *R. v. Tubbee*, 1 Up. Can. P. R. 103.

³ See *Whart. Crim. Law*, 8th ed. § 1710.

she is excluded by the very hypothesis she is called to support. The proper course is to examine her on her *voir dire*. If she claims to be the first wife, on her own showing she is inadmissible. If she denies that she was married to the defendant, then she should be admitted, and the jury directed to disregard her testimony if they believe her to be the defendant's wife.¹ Otherwise material testimony might be excluded on a hypothesis not only artificial but false. On the other hand, if a man be prosecuted for bigamy, his first wife, the validity of whose marriage is assumed by the prosecution, cannot be called to prove her marriage with the defendant.² The first marriage being established, the woman with whom the second marriage was had is a competent witness either for or against the prisoner; for the second marriage is void.³ It is said, indeed, that if the proof of the first marriage were doubtful, and the fact were controverted, the witness could not be admitted.⁴

It has been argued that the lawful wife, though incompetent as a witness, may appear in court for the purpose of being identified, although by this process suspicion may attach to her husband; it being said, by way of illustration, that she may be thus produced to be identified as having passed a note which he is charged with having stolen.⁵

§ 398. Aside from the question of interest, confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential inter-

Neither
husband
nor wife
can testify
as to con-

¹ Peat's case, 2 Lew. C. C. 288; R. v. Wakefield, Ibid. 279; which cases, however, only intimate such a course, without positively sanctioning it.

² Griggs's case, T. Ray. 1; 1 Hale, 698; 1 Russ. on Cr. 218; and see supra, § 390.

³ B. N. P. 287; Roscoe's Cr. Ev. 8th ed. 124; R. v. Serjeant, Ry. & M. 354, per Abbott, C. J.; R. v. Jones, C. & M. 614; State v. Patterson, 2 Ired. 346; Finney v. State, 3 Head, 544; State v. Johnson, 12 Minn. 476, and cases cited supra.

So where a woman had married the

plaintiff, and lived with him as his wife during the time of the transactions to which she was called to speak, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead, Patterson, J., held that there was no objection to her giving evidence for the defendant. Wells v. Fisher, 1 M. & R. 99; S. C., 5 C. & P. 12.

⁴ Griggs's case, T. Ray. 1.

⁵ Alison, Pract. of Cr. Law, 463; Taylor's Ev. § 1231. See Whart. Crim. Law, 8th ed. § 1710.

course during their marital relations.¹ The privilege, ^{fidential} ^{marital re-} however, is personal to the parties ; a third person who ^{lations.} happened to overhear a confidential conversation between husband and wife may be examined as to such conversation.² A letter, also, written confidentially by husband to wife is admissible against the husband, when brought into court by a third party.³ Nor does the privilege extend to conversations with third parties which the wife overheard ;⁴ nor does it protect husband or wife from being examined as to their conversation in presence of third parties ;⁵ though it is otherwise where such third persons are infants, or incapable, from their ignorance or other incapacity, of taking part in the conversation.⁶ The privilege, also, extends only to confidential communications, and does not cover topics incident to general intercourse.⁷

The wife is not competent to prove non-access of the husband ; but she may from necessity, in a case of bastardy, be examined to prove her criminal intercourse with another.⁸

§ 399. Even death or permanent separation by divorce does

¹ *Dexter v. Booth*, 2 Allen, 559; *Baldwin v. Parker*, 99 Mass. 79; *Raynes v. Bennett*, 114 Mass. 424; *Drew v. Tarbell*, 117 Mass. 90; *Bradford v. Williams*, 2 Md. Ch. 1; *Waddams v. Humphrey*, 22 Ill. 661; *Costello v. Costello*, 41 Ga. 613; *Wade's Succession*, 21 La. An. 343. A husband, under the Massachusetts statute, cannot be admitted to testify as to his private conversations with his wife, so as to charge his wife with liability based on such conversations. *Drew v. Tarbell*, 117 Mass. 90. So under Missouri statute. *Moore v. Wingate*, 53 Mo. 398; though in other respects either husband or wife may be a witness for the other. *Chesley v. Chesley*, 54 Mo. 347.

On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made was asked if he did not tell his wife that the prisoner acted only in his own defence. It was held that

the question required him to state a communication supposed to have been made by him to his wife, which, if made, was a confidential communication, and which he was not bound to disclose. *Murphy v. Com.* 23 Grat. 960.

² *Com. v. Griffin*, 110 Mass. 181.

³ *State v. Buffington*, 20 Kans. 599.

⁴ *Mercer v. Patterson*, 41 Ind. 440.

⁵ *State v. Center*, 35 Vt. 379; *Keator v. Dimmick*, 46 Barb. 158; *Allison v. Barrow*, 3 Coldw. 414. On this point see *Westerman v. Westerman*, 25 Oh. St. 500; cited *infra*, § 401.

⁶ *Jacobs v. Hesler*, 113 Mass. 160.

⁷ See *Colt, J., Litchfield v. Merritt*, 102 Mass. 524.

As to statutory changes in this respect see *infra*, § 401.

⁸ *Com. v. Shepherd*, 6 Binn. 283; *Com. v. Conelly*, 1 Browne, 284; *State v. Pettaway*, 3 Hawks, 623. See *infra*, § 518.

Effect on
admissi-
bility of
death or
divorce.

not release the parties from the obligation of secrecy thus imposed by marriage.¹ The survivor, in such cases, is ordinarily precluded from divulging information he has received in marital confidence.²

General
statutes re-
moving
disabilities
do not
touch this.

§ 400. The reason for the exclusion of husband and wife, when called for or against the other, being social policy, and not interest, statutes abolishing incompetency resting on interest do not remove the common law incompetency of husband and wife for or against the other.³ This is eminently the case in respect, as will presently be seen, to the confidential communications to each other of husband and wife.⁴

§ 401. Whether special statutes prescribing that the marital relation shall not be a ground for the exclusion of witnesses apply to criminal prosecutions depends upon

¹ See Whart. on Ev. § 429, for cases.

² *Monroe v. Twistleton*, Peake's Ev. Ap. 39; *Doker v. Hasler*, R. & M. 198; *Avison v. Kinnaid*, 6 East, 192; *Stein v. Bowman*, 13 Pet. 209; *Ryan v. Follansbee*, 47 N. H. 100; *Williams v. Baldwin*, 7 Vt. 503; *State v. Phelps*, 2 Tyler, 374; *Coffin v. Jones*, 13 Pick. 444; *Gray v. Cole*, 5 Harring. 418; *Wells v. Tucker*, 3 Binn. 366; *Cornell v. Vanartsdalen*, 4 Penn. St. 364; *Griffin v. Smith*, 45 Ind. 366; *Spradling v. Conway*, 51 Mo. 51; *State v. Jolly*, 3 D. & Bat. 110; *Lingo v. State*, 29 Ga. 470; *Brewer v. Ferguson*, 11 Humph. 565.

On an indictment for fornication and adultery, one who had been the husband of the female defendant, but had been divorced from her on account of her adultery, was held in North Carolina incompetent to testify against the defendants as to the adulterous intercourse, or any other fact which occurred while the marriage existed. *State v. Jolly*, 3 Dev. & B. 110. Otherwise in civil suit against paramour. *Dickerman v. Graves*, 6 Cush. 30. And after a divorce a

vinculo, the husband has been held a competent witness to prove the marriage with his divorced wife, on an indictment of another person for adultery alleged to have been committed during coverture with such divorced wife. *State v. Dudley*, 7 Wis. 664.

³ *Lucas v. Brooks*, 18 Wall. 436; *McKeen v. Frost*, 46 Me. 239; *Young v. Gilman*, 46 N. H. 484; *Cram v. Cram*, 33 Vt. 15; *Lunay v. Vantyne*, 40 Vt. 501; *Kelly v. Drew*, 12 Allen, 107; *Drew v. Tarbell*, 117 Mass. 90; *Symonds v. Peck*, 10 How. (N. Y.) Pr. 395; *Rich v. Husson*, 4 Sandf. 115; *People v. Reagle*, 60 Barb. 527; *Steen v. State*, 20 Oh. St. 333; *Mitchinson v. Cross*, 58 Ill. 366; *Bevins v. Cline*, 21 Ind. 37; *Pea v. Pea*, 35 Ind. 387; *Stanley v. Stanton*, 36 Ind. 445; *Costello v. Costello*, 41 Ga. 613; *Dunlap v. Hearn*, 37 Miss. 471 (though see *Lockhart v. Luker*, 36 Miss. 68); *Funk v. Dillon*, 21 Mo. 294; *Birdsall v. Dunn*, 16 Wis. 235; *Hobby v. Wisconsin Bk.* 17 Wis. 167. See *infra*, § 437.

⁴ See *infra*, §§ 407, 437.

the terms of such statutes.¹ But such statutes, when limited to the restoration of competency, do not preclude the parties from taking advantage of the right of withholding privileged communications which occurred during coverture and not in the presence of third parties;² nor do they strip the parties of the right to decline to answer criminating questions.³ Privilege, as it exists at common law, can be asserted in all cases in which it is not specifically prohibited by statute.⁴

¹ See *Packet Co. v. Clough*, 20 Wall. 528; *State v. Black*, 63 Me. 210; *Burke v. Savage*, 13 Allen, 408; *Merriam v. R. R.* 20 Conn. 354; *Southwick v. Southwick*, 49 N. Y. 510; *Marsh v. Potter*, 30 Barb. 506; *People v. Commis.* 16 N. Y. Sup. Ct. (9 Hun) 212; *Bronson v. Bronson*, 8 Phila. 261; *Dellinger's Appeal*, 71 Penn. St. 425; *Robinson v. Chadwick*, 22 Oh. St. 527; *Menk v. Steinfert*, 39 Wis. 370; *Bennifield v. Hypres*, 38 Ind. 498; *McNail v. Ziegler*, 68 Ill. 224; *State v. Nash*, 10 Iowa, 81; *State v. Bennett*, 31 Iowa, 24; *State v. Hazen*, 39 Iowa, 649; *Ruth v. Ford*, 9 Kans. 17; *Furrow v. Chapin*, 13 Kans. 107; *Bradsher v. Brooks*, 71 N. C. 322; *Chesley v. Chesley*, 54 Mo. 347; *Evers v. Ins. Co.* 59 Mo. 429.

² *McKeen v. Frost*, 46 Me. 239; *Jones v. Simpson*, 59 Me. 180; *Young v. Gilman*, 46 N. H. 484; *Dexter v. Booth*, 2 Allen, 559; *Burke v. Savage*, 13 Allen, 408; *Bliss v. Franklin*, 13 Allen, 244; *Packard v. Reynolds*, 100 Mass. 153; *Baxter v. R. R.* 102 Mass. 885; *Raynes v. Bennett*, 114 Mass. 424; *Drew v. Tarbell*, 117 Mass. 90; *People v. Reagle*, 60 Barb. 527; *Southwick v. Southwick*, 49 N. Y. 513; *Wehrkamp v. Willett*, 4 Abb. (N. Y.) App. 548; *Westerman v. Westerman*, 25 Oh. St. 500; *Bevins v. Cline*, 21 Ind. 371; *Thomas v. Barbour*, 49 Ill. 370; *Mitchinson v. Cross*,

58 Ill. 366; *Reeves v. Herr*, 59 Ill. 81; *State v. Bernard*, 45 Iowa, 234; *Jackson v. Jackson*, 40 Ga. 157; *Costello v. Costello*, 41 Ga. 613; *Buck v. Ashbrook*, 51 Mo. 539; *Moore v. Wingate*, 53 Mo. 398; *Magness v. Walker*, 26 Ark. 470; *Creamer v. State*, 34 Tex. 173; *State v. McCord*, 8 Kans. 232.

³ *Bronson v. Bronson*, 8 Phila. 261; *State v. McCord*, 8 Kans. 232.

⁴ In New Hampshire the statutes are thus recapitulated:—

“In *State v. Moulton*, 48 N. H. 485, it was expressly held that the recent statutes, making the wife a witness for her husband, do not apply in criminal cases. A different rule is now established by the following statute, P. L. 1871, c. 38, § 2: ‘In any case where the respondent in any criminal prosecution is allowed to testify by law, the wife of such respondent shall be a competent witness.’ Sec. 3. ‘This act shall apply to all cases now pending, and shall take effect upon its passage.’ Approved July 13, 1871.

“In civil cases, under the provisions of § 22, of c. 209, Gen. Sts. (as amended by P. L. 1869, c. 29, and P. L. 1870, c. 20), the wife may testify for or against her husband, and the husband for or against the wife, in any case, when it appears to the court that their examination as witnesses upon the points to which their testi-

§ 402. The fact that a married person has testified in one way in a trial, does not preclude the husband or wife of such person from testifying precisely to the opposite. Such impeaching testimony is admissible, even though the effect be to discredit the party contradicted.¹ Whether

Husband
and wife
may be ad-
mitted to
contradict
each other.

mony is offered would not lead to a violation of marital confidence; and in the trial of any civil suit or proceeding in which a husband or wife is competent, or shall be admitted to testify as witnesses for or against each other on one side of a case, the same right shall exist on the opposite side of the case. Besides these general provisions, applicable to all cases alike, the husband and wife are by statute (Gen. Sts. c. 209, §§ 20, 21) made witnesses for or against each other, whether joined as parties or not, in the following cases: 1st. In actions upon insurance policies, so far as relates to the amount and value of the property insured. 2d. In suits against common carriers, so far as relates to the loss, amount, and value of the property in question. 3d. In actions on matter arising before marriage. 4th. In suits for personal injuries to the wife, or for damages to the husband on that account." *State v. Straw*, 50 N. H. 460, Ladd, J.

Under the Illinois statute husband and wife are not competent witnesses against each other, though in certain cases they may be examined in each other's behalf. *Hawver v. Hawver*, 78 Ill. 412; *Trepp v. Barker*, 78 Ill. 146; *Primmer v. Clabaugh*, 78 Ill. 94.

In New York, under the provisions of the Act of 1867 (c. 887 Laws of 1867), in an action between husband and wife, either is a witness in his or her behalf, against the other, save in the cases excepted in the act. The act, it is held, applies to all trials thereafter had in actions pending

when it took effect, and under it the husband or wife can testify to conversations and communications (not confidential) had with the other prior to the taking effect of the act. *Southwick v. Southwick*, 49 N. Y. 510.

In Pennsylvania, under the Act of April 15, 1869, a wife may be called by her husband as a witness, notwithstanding she may be compelled, on cross-examination, to give evidence against him; the act provides for the competency of the witness, not for the effect of her testimony. *Ballantine v. White*, 77 Penn. St. 20.

In Ohio, under the amendatory Act of April 18, 1870 (67 Ohio L. 113), husband and wife are competent witnesses for and against each other, except as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person.

The act is held to be applicable to cases pending and causes of action existing at the time of its passage, notwithstanding the provisions of the Act of February 19, 1866 (S. & S. 1), declaring the effect of repeals and amendments.

It has been further ruled that evidence that a third person was present, and known to be present, at the time of making such communications, or doing such acts, is for the court, and not for the jury, and, on error, will be presumed to have been given to the court, unless the contrary appears. *Westerman v. Westerman*, 25 Oh. St. 500.

¹ *Supra*, § 396; *Stapleton v. Crofts*,

either husband or wife can be permitted, in a collateral proceeding, to charge the other with a criminal offence, has been doubted. In England, it was at one time held that no such testimony could be received,¹ and so has it frequently been ruled in this country.² But it is more reasonable to admit such testimony in all cases where it cannot be used as an instrument of future prosecution, provided the witness be not compelled to testify.³

VII. DISTINCTIVE RULES AS TO EXPERTS.

§ 403. An expert has been defined to be a witness who testifies as to conclusions from facts, while an ordinary witness testifies only as to facts. This definition, however, is not sufficiently exact. No witnesses, called to detail facts, reproduce such facts as they really exist.⁴ Apart from the psychological question, whether what we see is immediately perceived by us, such acts are inferred, not actually witnessed.⁵ I hear the report of a gun, for instance; I notice that the gun is aimed at a particular bird by a sportsman, and I see the bird fall; I infer that the sportsman killed the bird, though I did not see the shot as it passed through the air and struck. Identity (as has already been seen) is always a matter of inference, and so are all statements involving the application of a predicate to a subject.⁶ We must therefore proceed further when we seek to distinguish between the expert and the non-expert. And the true distinction is this: that the non-expert testifies as to a

Expert is entitled to testify as a specialist.

18 Q. B. 368; *Annesley v. Anglesea*, 17 How. St. Tr. 1276; *R. v. All Saints*, 6 M. & S. 194; *R. v. Bathwick*, 2 B. & Ad. 639; *Stein v. Bowman*, 13 Pet. 209; *State v. Marvin*, 35 N. H. 22; *Fitch v. Hill*, 11 Mass. 286; *Roy. Ins. Co. v. Noble*, 5 Abb. Pr. (N. S.) 55; *Ware v. State*, 35 N. J. 553; *Com. v. Patterson*, 8 Phila. 609; *State v. Dudley*, 7 Wis. 664. See, however, *contra*, *Roach v. State*, 41 Tex. 261; *Keaton v. McGwier*, 24 Ga. 217.

¹ *R. v. Clivinger*, 2 T. R. 263.

² *State v. Welsh*, 26 Me. 30; *Com. v. Sparks*, 7 Allen, 534; *State v. Gardner*, 1 Root, 485; *State v. Wilson*, 31 N. J. 77; *State v. Pettaway*, 3

Hawks, 623; *People v. Horton*, 4 Mich. 87. See *R. v. Williams*, 8 C. & P. 289. But see *Tilton v. Beecher*, *supra*, § 396.

³ *R. v. Bathwick*, 2 B. & Ad. 639; *R. v. All Saints*, 6 M. & S. 194; *R. v. Halliday*, 8 Cox, 298; *State v. Briggs*, 9 R. I. 361; *Petrie v. Howe*, 4 N. Y. Sup. Ct. 85; *Tilton v. Beecher*, Abbott's Rep. ii. 116. See *Phillipp's Ev. i.* 84 (4th Am. ed.); *Com. v. Reid*, 8 Phila. 609; *State v. Dudley*, 7 Wis. 664. See *supra*, § 396.

⁴ *Supra*, § 378.

⁵ See *supra*, § 17.

⁶ See *supra*, §§ 7, 18, 19.

subject matter readily mastered by the adjudicating tribunal; the expert to conclusions outside of such range. The non-expert gives the results of a process of reasoning familiar to every day life; the expert gives the results of a process of reasoning which can be mastered only by special scientists.¹

§ 404. It is elsewhere shown that foreign laws are to be proved by experts, which proof may be by parol.² Such is also the case with domestic systems of law not cognate with or included in the common law or the statute law of the jurisdiction. Hence the opinion of experienced military officers may be taken as to a point of military practice.³ And in an action for libel arising out of a race-horse transaction, it was held by Lord Denman, that a member of the jockey club might be asked, as a witness, whether he did not consider a certain course of conduct to be dishonorable.⁴

§ 405. The difficulty of distinguishing between "facts" and "opinions" has been already noticed; and it has been seen that while all facts testified to are in one sense opinions, all opinions testified to are in one sense facts.⁵ The question, therefore, is one as to the meaning of terms; and assuming, for the purpose of the present inquiry, that "opinion" means a conclusion from a series of facts capable of being substantively proved, we must accept as a general rule the proposition, to be hereafter more fully illustrated,⁶ that a witness cannot give his conclusions from facts, but must state the facts, leaving the drawing of conclusions to the court and jury. The same rule applies to experts, in all matters as to which the lay mind is capable of forming a conclusion from facts susceptible of ascertainment, either as matters testified to by witnesses, or as matters of notoriety.⁷ Thus an expert cannot be asked whether a railroad train stopped long enough for the passengers to get off, or whether it is safer to discharge passengers at a station or before reaching it,⁹ or whether

Specialists may be examined as to laws other than the *lex fori*.

On matters non-professional or of common observation, experts cannot give opinions.

¹ Whart. on Ev. § 403.

² Whart. on Ev. § 435.

³ Bradley v. Arthur, 4 B. & C. 295.

⁴ Greville v. Chapman, 5 Q. B. 731.

⁵ Supra, §§ 7 et seq.

⁶ Infra, § 457.

⁷ See cases cited Whart. on Ev. § 436. Compare Com. v. Piper, 120 Mass. 185; Beasley v. People, 89 Ill. 572; Rash v. State, 61 Ala. 89.

⁸ Keller v. R. R. 2 Abb. (N. Y.) App. 480.

it was prudent to blow a steam-whistle at a particular time.¹ So a practising physician cannot be examined as to the amount of damages resulting to one physician from the violation of a contract by another not to practise in a particular district;² nor can a city fireman be asked as to the influence of the wind in extending a fire.³ So a physician cannot be asked as an expert whether a rape could have been committed in a particular way, when the question is one which it required no professional knowledge to answer;⁴ nor as to the effect of sexual solicitations;⁵ nor as to the effect on the health of an habitual use of intoxicating liquor.⁶

§ 406. Where, however, it is necessary for the jury to be familiar with the operation of laws too recondite to be mastered by the lay mind in the hurry of a trial, it is necessary to call experts in such laws to testify to their bearing on points in issue. It is to such matters, and only as to such matters, that experts are entitled to give what, in the sense in which the term is here used, is "opinion."⁷ Whether, as to the particular question, the witness is an expert, the court is to determine,⁸ and on this point

Court is to determine whether witnesses are properly "experts."

¹ Hill v. R. R. 55 Me. 438.

² Linn v. Sigsbee, 67 Ill. 75.

³ State v. Watson, 65 Me. 74.

⁴ Cook v. State, 24 N. J. L. 848.

But in Michigan it has been held that it was permissible to call medical experts to testify as to the unlikeliness of sexual intercourse having been accomplished, as the prosecutrix stated, in a buggy. People v. Clark, 33 Mich. 112.

⁵ People v. Royal, 53 Cal. 65.

⁶ Rawls v. Ins. Co. 27 N. Y. 282.

In New York, on a trial for murder, a medical witness testified that he saw defendant on the evening of the day after the killing, conversed with him, and then thought him deranged; that he thought the insanity was *delirium tremens*; that he knew defendant's habits of drinking, and supposed drinking to be the cause of his insanity; that he had been pres-

ent and heard all the evidence. The witness then stated, under objection, how long he thought defendant had been in this state of delirium, but was not allowed to state whether, in his opinion, he was in this state on the night of the alleged killing. It was held that this was no error. People v. McCann, 3 Parker C. R. 272.

And when, in Missouri, in a murder trial, the counsel for the defendant put to a medical expert the following question: "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" it was correctly decided by the Supreme Court that the question was properly ruled out. State v. Klinger, 46 Mo. 224.

⁷ See Whart. on Ev. § 386.

⁸ See *infra*, § 408.

the witness may be examined, and evidence may be received *aliunde*.¹

§ 407. An expert, such is the prevailing opinion, may show that his views are sustained by standard authorities in his profession.² He cannot, however, be permitted to read, as independent proof, extracts from books in his department,³ though he may refresh his memory, when giving the conclusions arrived at in his specialty, by turning to standard works.⁴ And in cases where an expert cites scientific works, they may be afterwards put in evidence to discredit him.⁵

§ 408. To entitle a witness to be examined as an expert in a specific topic, he must, in the opinion of the court, have special practical acquaintance with the immediate line of inquiry.⁶ Yet he need not be thoroughly acquainted with the differentia of the specialty under consideration. If this were necessary, few experts could be admitted to testify; certainly no courts could be found capable of determining whether such experts were competent. A general knowledge of the de-

¹ *Infra*, § 411; *Davis v. State*, 38 Md. 15; *Tome v. R. R.* 39 Md. 36; *Mendum v. Com.* 6 Rand. 704; *Bills v. Ottumwa*, 35 Iowa, 107; *Brabbitts v. R. R.* 88 Wis. 290; *Caleb v. State*, 39 Miss. 721. And see *Whart. on Ev.* §§ 666-721.

² *Collier v. Simpson*, 5 C. & P. 73; *Cocks v. Purday*, 2 C. & K. 290.

³ *Washburn v. Cuddihy*, 8 Gray, 480; *Com. v. Sturtivant*, 117 Mass. 122. *Infra*, § 419. As to admissibility of scientific works as independent authority see *infra*, §§ 587-9.

⁴ See *infra*, §§ 587-9; *Darby v. Ousley*, 1 H. & N. 1; *Pierson v. Hoag*, 47 Barb. 248; *Hornblower, C. J.*, in 1 Zabr. 196; *Cory v. Silcox*, 6 Ind. 39; *Harvey v. State*, 40 Ind. 516; *Bowman v. Torr*, 3 Iowa, 571; *Ripon v. Bittel*, 30 Wis. 614; *Luning v. State*, 1 Chandl. (Wis.) 264; *State v. Terrell*, 12 Richard. 321; *Merkle v. State*, 37 Ala. 139. See

Melvin v. Easley, 1 Jones (N. C.), 386.

⁵ *Ripon v. Bittel*, 30 Wis. 614.

⁶ *Supra*, § 406. See cases cited in *Whart. on Ev.* §§ 439; and compare *State v. Watson*, 65 Me. 74; *State v. Secrist*, 80 N. C. 450.

In *Brownell v. People*, 38 Mich. 735, *Campbell, C. J.*, said:—

“It appears to us that the testimony of one called as an expert upon the effect of a pistol shot upon the clothing, when fired at a certain distance, was based on too small an experience. A single pistol shot through his own clothing, without any proof of the comparative amounts or kinds of loading, and without ever seeing further experiments at greater or less distances or at the same distance, with pistols of the same or different make or calibre, is too small a foundation for generalizing.”

partment to which the specialty belongs would seem to be enough.¹

§ 409. The court has to decide, also, not only what makes an expert, but how he is to be sustained or impeached. Court decides as to impeaching or sustaining expert. "After a witness has been admitted to testify as an expert," so says, it is true, an able writer, "evidence cannot be given to the jury of the opinions of other experts in the same science as to whether the witness was qualified to draw correct conclusions in the science on which he had been examined, though such testimony might have been properly offered to the court to show the competency of the witness before he was admitted to testify."² The rule imposing limitations upon such opinions is now well established, and the expert's own character is best protected by it, under the maxim of *experto crede*, since whatever might be said by one expert in derogation of another's opinion might in turn be said of his own: *mutato nomine de te fabula narratur*.³ But it is difficult to understand why an expert should be withdrawn from the operation of the general rule of law which permits witnesses to be impeached by showing their incapacity. It is admissible to show that a witness who testifies that he saw a particular thing did not see it, because he was absent or blind; and hence it may be shown that an expert who testifies to certain results is incapable of reaching them. But unless the capacity or reputation of an expert be *assailed* it cannot be *proved* by the party calling him,⁴ though it is said that his special knowledge may be thus proved.⁵ At all events, whether an expert can be thus impeached or sustained, and if so, how this is to be done, is exclusively for the court.

¹ State v. Wood, 53 N. H. 484; Dole v. Johnson, 50 N. H. 452; Cook v. Castner, 9 Cush. 266; Com. v. Rich, 14 Gray, 335; Shattuck v. Train, 116 Mass. 296; Roberts v. Johnson, 58 N. Y. 613; Castner v. Sliker, 33 N. J. L. 95, 507; Consolidated Co. v. Cashow, 41 Md. 59; House v. Fort, 4 Blackf. 293; Washington v. Cole, 6 Ala. 212; Tullis v. Kidd, 12 Ala. 648; Spiva v. Stapleton, 38 Ala. 171; Morrissey v. People, 11 Mich. 327; Davis v. State, 35 Ind. 496; State v.

Hinkle, 6 Iowa, 380; State v. Reddick, 7 Kans. 143. But in Emerson v. Lowell, 6 Allen, 146, it was ruled that a physician who has had no experience of the effect on health of breathing illuminating gas could not be examined as an expert as to such effects.

² Tullis v. Kidd, 12 Ala. 648.

³ Ordonaux, Juris. of Med. § 117.

⁴ Dephue v. State, 44 Ala. 32.

⁵ Supra, § 406; Laros v. Com. 84 Penn. St. 200.

§ 410. Still more strikingly are we reminded that we must after all go back to the courts to determine the limits of expert testimony, when we accept the position so often invoked, that while "men of science" are experts, "quacks" are not. But who are "quacks?" Are practitioners of new, and what may at the time be professionally viewed as heretical, schools, "quacks?" This would have disqualified both Willis and Esquirol, each of whom was for a time viewed as a quack by the body of conservative practitioners. Is he a quack who adheres to a system which, though venerable and supported by high past authority, is now regarded as exploded? Would one of Bishop Berkeley's disciples be an expert as to the value of tar water? Is even a psychological physician of eminence an expert as to matters mainly speculative or ethical? The latter question was negatived in 1869, in the Court of Appeals of Kentucky, by Chief Justice Williams, who said that "the opinions of experts, not founded on science, but on a mere theory of morals or ethics, whether given by professional or unprofessional men, are wholly inadmissible as evidence. Hence the opinion of even physicians, that no sane man in a Christian country would commit suicide, not being founded on the science or phenomena of the mind, but rather a theory of morals, religion, and future responsibility, is not evidence."¹

We find ourselves, therefore, reduced to the following dilemma: Either the court must distinguish between rival schools, in which case it determines in advance what particular tenets of science are law; or it must decline so to decide, in which case there is no ground of discrimination of any kind between professed experts.

To the same result are we driven by the criterion invoked by Chief Justice Williams, in the case just cited. To declare that experts are admissible to state what is "scientific," but not what is "speculative" or "ethical," is to define what "science" is and what are its bounds, and to assume the right of rejecting from the domain of science anything that the law claims to belong to its own specific control. We then have either to abdicate such a right on the part of the court, and to give unrestrained license and final authoritativeness to experts; or we

¹ St. Louis Mut. Ins. Co. v. Graves, 6 Bush, 290.

must revert to the old doctrine, that experts, no matter on what they testify, simply supply data as to whose competency and relevancy the court is to judge, and as to which the court is finally to declare the law. And it is to this result that sound reason as well as recent adjudications tend.

§ 411. So far as concerns the line between experts and non-experts, the rule, as already stated, is that on topics of notoriety, and within the ordinary experience of jurymen, an expert cannot give conclusions.¹

But not to include matters of ordinary observation.

§ 412. Between medical men of distinct schools, and between medical men of different grades of culture in the same school, another line of discrimination is to be invoked. Jurisprudence does not say to any particular school, "You are right and the others are wrong;" but it says to the members of each school, "You are bound to exercise the skill, and possess the qualifications, usual to good practitioners of your particular class."² So jurisprudence does not say to a physician or surgeon called to testify whether a wound or a poison was fatal, "You must have a particular diploma, or belong to a particular professional school;" but it says, "If you have become familiar with such laws of your profession as bear upon this issue, then you can testify how the issue is affected by such laws."³ Hence, physicians, when in general practice, are admissible to state the nature and effects of a disease;⁴ the conditions of gestation;⁵ the effects of particular poisons on the human system;⁶ the effects of a particular treatment;⁷ the likelihood that death could be produced by a particular disease,⁸ though they have not made such topics a specialty.⁹ Medical attendants, neither specialists nor family physicians, may be ex-

Medical man must be an expert in his school.

¹ Supra, § 405; *Carter v. Boehm*, 1 Sm. Lead. Cas. note; *Bell on Expert Test.* 13.

² *Whart. on Neg.* § 733; *Corsi v. Maretzek*, 4 E. D. Smith, 1.

³ *Livingston's case*, 14 Grat. 592; *New OrL. Co. v. Allbritton*, 38 Miss. 242.

⁴ See cases cited *Whart. on Ev.* § 411; *Mitchell v. State*, 58 Ala. 417.

⁵ *State v. Smith*, 32 Me. 369; *Young v. Makepeace*, 103 Mass. 50.

⁶ *Stephens v. People*, 4 Parker C. R. 396.

⁷ *Barber v. Merriam*, 11 Allen, 322.

⁸ *State v. Smith*, 32 Me. 369; and cases cited *Whart. on Ev.* § 441.

⁹ *Dole v. Johnson*, 50 N. H. 452; *Castner v. Sliker*, 33 N. J. L. 95, 507.

amined as to cases of insanity,¹ though they may not be competent to answer questions as to hypothetical cases.² And a surgeon is admissible to prove the nature of a wound and its probable cause and effects,³ and that it was not of recent infliction,⁴ though it has been held not admissible for a surgeon to give an opinion on merely speculative data.⁵ And he may be asked which of several wounds produced death.⁶ But as to matters out of the range of a specific department to which he has confined himself, an expert is not entitled to testify.⁷

§ 413. Experts in physical science are admissible on the same conditions.⁸ Thus it is allowable to examine chemists and microscopists, as to whether certain stains are from blood,⁹ as to the effects of a particular poison,¹⁰ as to the nature of ink stains,¹¹ as to effect of particular powders in erasing writing;¹² physicians, with a general, though not special knowledge of chemistry, as to whether a particular poison was found in the stomach of the deceased;¹³ a machinist as to the causes of a leak

¹ *Hastings v. Rider*, 100 Mass. 622; *Chandler v. Barrett*, 21 La. An. 58; *Davis v. State*, 35 Ind. 496; *State v. Reddick*, 7 Kans. 143.

² See fully *infra*, § 418; *Com. v. Rich*, 14 Gray, 335.

³ *Rowell v. Lowell*, 11 Gray, 420; *Linton v. Hurley*, 14 Gray, 191; *Com. v. Piper*, 120 Mass. 186; *Wilson v. People*, 4 Parker C. R. 619; *Gardiner v. People*, 6 Parker C. R. 155; *Rumsey v. People*, 19 N. Y. 41; *Fort v. Brown*, 46 Barb. 366; *People v. Kerrains*, 1 Thomp. & C. 333; *Com. v. Lenox*, 3 Brewst. 249; *Davis v. State*, 38 Md. 15, 43; *State v. Morphy*, 33 Iowa, 270; *Shelton v. State*, 34 Tex. 662.

⁴ *Lindsay v. People*, 63 N. Y. 143.

⁵ *Com. v. Piper*, 120 Mass. 186; *Hawks v. Charlemont*, 110 Mass. 110; *Kennedy v. People*, 39 N. Y. 245.

⁶ *Infra*, § 774.

⁷ See *Emerson v. Lowell*, 6 Allen, 146.

⁸ *Page v. Parker*, 40 N. H. 47.

⁹ *State v. Knights*, 43 Me. 11; *Peo-*

ple v. Gonzales, 35 N. Y. 49; *Gaines v. Com.* 50 Penn. St. 319. See *Whart. on Hom.* § 683. *Infra*, § 777.

¹⁰ *Hartung v. People*, 4 Parker C. R. 319; and this though the expert be not a physician, or trained as such. *State v. Cook*, 17 Kans. 392.

¹¹ *Farmers' Bk. v. Young*, 36 Iowa, 45.

¹² *People v. Brotherton*, 47 Cal. 388.

In this, which was a trial for forgery committed by altering a check, by extracting writing therefrom and writing new words or figures in place thereof, a witness, who was not called as a scientific expert, was permitted to testify as to the chemical effect that a powder, found in the possession of the defendants, had on writing in a check similar to that by the alteration of which the forgery was committed. It was further held, that the check upon which the effect testified to by the witness was produced might be exhibited to the jury.

¹³ *State v. Hinkle*, 6 Iowa, 380.

in a water-pipe ;¹ and a college graduate who has studied chemistry with a distinguished chemist, has taught chemistry for five years, and is acquainted with gases and with the composition of camphene, as to the safety of a camphene lamp.²

§ 414. Nor is it necessary that a specialty, to enable one of its practitioners to be examined as an expert, should involve abstruse scientific conditions. No matter how humble may be a specialty, and how purely mechanical may be its practice, those familiar with it may be examined as to its laws. But the specialty must be that in which the expert is skilled.³ Thus a painter cannot be examined as to the construction of a building,⁴ nor can a surveyor of highways, who is not an expert in road building, as to the safety of a road,⁵ nor a surveyor as to the legal interpretation to be given to a survey.⁶ But practical surveyors may express their opinions, whether certain marks on trees, piles of stone, &c., were intended as monuments of boundaries ;⁷ farmers may be asked as to the smell of grain ;⁸ and a person familiar with the use of revolvers as to what barrels of a revolver had been fired.⁹

And so of practitioners in a business specialty.

§ 415. A specialist in a particular art is admissible to prove the conditions of such art. Thus a painter, whether professional or amateur, is admissible on the question of the genuineness of a picture ;¹⁰ a photographer, as to the character of the execution of a photograph.¹¹ So, where the question is whether a paper had contained certain pencil marks, which were alleged to have been rubbed out, the opinion of an engraver, who had examined the paper with a mirror, may be received.¹² And seal-engravers may be called to give their opinions upon an impression, whether it was made from an original seal or from another impression.¹³

So of artists.

¹ *Hand v. Brookline*, 126 Mass. 324. See *Sheldon v. Booth*, 50 Iowa, 209.

² *Bierce v. Stocking*, 11 Gray, 174. See Whart. on Ev. § 444.

³ *Supra*, § 408.

⁴ *Kilbourne v. Jennings*, 38 Iowa, 533.

⁵ *Lincoln v. Barre*, 5 Cush. 590.

⁶ *Ormsby v. Ihmsen*, 34 Penn. St. 462 ; Whart. on Ev. § 972.

⁷ *Davis v. Mason*, 4 Pick. 156.

⁸ *Walker v. State*, 58 Ala. 393.

⁹ *Wynne v. State*, 56 Ga. 113.

¹⁰ *Abbey v. Lill*, 5 Bing. 299, 304 ; *Woodcock v. Houldsworth*, 16 M. & W. 124.

¹¹ *Barnes v. Ingalls*, 39 Ala. 193.

¹² *R. v. Williams*, 8 C. & P. 434, per Parke, B., and Tindal, C. J.

¹³ Per *Ld. Mansfield*, in *Foulkes v. Chadd*, 3 Dougl. 157.

§ 416. Value can only be proved by obtaining the sense of those who determine the market price; since when we ask a witness as to the value of an article, we do not mean the value to himself, but the value to those who at the time in question are buying or selling such articles. For this purpose it is proper to call as witnesses those familiar with the particular market.¹

§ 417. If the object is to determine whether a particular supposed case is to be regarded as indicating insanity, only experts in insanity are to be called, since only experts are competent to describe the differentia of insanity scientifically.² But on the question whether a particular person is insane, there is a strong chain of decisions to the effect that not merely physicians, skilled in diseases of the mind, but intelligent and observant attendants and friends, who have had constant intercourse with the patient, may be examined.³ So far as concerns stupor, senile amentia, or other chronic and obvious mental disease, which ordinary observers are competent to determine, the practical observation of business men, coming into constant intercourse with a party,

¹ Whart. on Ev. § 446.

² Com. v. Rogers, 7 Met. 500; State v. Windsor, 5 Harring. 512, and cases infra, § 418.

³ Wheeler v. Alderson, 3 Hagg. 574; Wright v. Tatham, 5 Cl. & F. 692; Harrison v. Rowan, 3 Wash. C. 580; Cram v. Cram, 33 Vt. 15; Fairchild v. Bascomb, 35 Vt. 398; State v. Hayden, 51 Vt. 296; Grant v. Thompson, 4 Conn. 203; Kinne v. Kinne, 9 Conn. 102; Real v. People, 42 N. Y. 270; Fagnan v. Knox, 40 N. Y. Sup. Ct. 41; Castner v. Sliker, 33 N. J. L. 95, 507; Rambler v. Tryon, 7 S. & R. 90; Wilkinson v. Pearson, 23 Penn. St. 177; Pannell v. Com. 86 Penn. St. 260; Titlow v. Titlow, 54 Penn. St. 216; Townshend v. Townshend, 7 Gill, 10; Weems v. Weems, 19 Md. 334; Livingston v. Com. 14 Grat. 592; Brown v. Com. 14 Bush, 398; Clark v. State, 12 Oh.

483; Doe v. Reagan, 5 Blackf. 217; Davis v. State, 35 Ind. 496; State v. Reddick, 7 Kans. 143; Beaubien v. Cicotte, 12 Mich. 459; Clary v. Clary, 2 Ired. L. 78; State v. Henderson, 68 N. C. 350; State v. Ketchey, 70 N. C. 621; Powell v. State, 25 Ala. 21; Stuckey v. Bellah, 41 Ala. 700; Wilkinson v. Moseley, 30 Ala. 562; Baldwin v. State, 12 Mo. 223; Dove v. State, 3 Heisk. 348; People v. Sanford, 43 Cal. 29; Pigg v. State, 43 Tex. 108.

A witness may be allowed to express his opinion as to the state of mind of another witness during certain periods; and it is not necessary that such witness should be an expert or a physician. State v. Ketchey, 70 N. C. 621; approving State v. Baker, 63 N. C. 279; State v. Henderson, 68 N. C. 350. See supra, § 378, for other cases.

is naturally more likely to attract confidence than are the speculative conclusions of experts.¹ It is otherwise, however, when a non-expert is called upon to express an opinion as to facts capable of a contested interpretation, concerning which the jury are as competent to judge as is the witness,² though it is hard to see how his opinion, based on his personal observations of the patient's condition, can be excluded,³ since his opinion in such cases is but a short way of expressing the facts, and the facts, when he details them, are all opinions. But as to hypothetical cases, a non-expert, or an expert without special cultivation,⁴ cannot be asked;⁵ and while an expert who has personally visited a patient can unquestionably be asked for his opinion as to the patient's sanity,⁶ his conclusions must be drawn from direct observation, not from the reports of others.⁷ As to whether a party at a given time was intoxicated, non-experts as well as experts can speak.⁸

¹ *Rutherford v. Morris*, 77 Ill. 397; *Rankin v. Rankin*, 61 Mo. 295; *People v. Sanford*, 43 Cal. 29.

² As limiting non-experts to a bare statement of facts, see *State v. Pike*, 47 N. H. 379; *Dewitt v. Barley*, 5 Selden, 371; *Clapp v. Fullerton*, 34 N. Y. 190; *Real v. People*, 42 N. Y. 270; *Sears v. Schafer*, 1 Barb. 408; *Higgins v. Carlton*, 28 Md. 115; *Runyan v. Price*, 15 Oh. St. 1; *Caleb v. State*, 39 Miss. 722; *Farrell v. Brennan*, 32 Mo. 328; *State v. Coleman*, 27 La. An. 691; *Gehrke v. State*, 13 Tex. 568. That a non-expert may be cross-examined as to the basis of his opinion see *Pannell v. Com.* 86 Penn. St. 260.

When non-professional witnesses were asked, "From what you saw of him that night, what impression did his words and acts make upon your mind? What impression as to his condition of mind did his conduct and acts and words make upon you at the time? In what state of mind did you believe him to be by reason of what he said and did upon that occasion?"

and other like questions; it was held that they were properly excluded. *Real v. The People*, 42 N. Y. 270.

³ *Com. v. Sturtivant*, 117 Mass. 122; and compare authorities collected in Judge Doe's dissenting opinion in *State v. Pike*, 47 N. H. 120; *Bell on Expert Test.* 21.

⁴ *Infra*, § 418; *Com. v. Rich*, 14 Gray, 335; *Caleb v. State*, 39 Miss. 722; *Russell v. State*, 53 Miss. 368.

⁵ *Com. v. Rich*, 14 Gray, 335; *State v. Klinger*, 46 Mo. 228; *Caleb v. State*, 39 Miss. 722, and cases *infra*, § 418.

⁶ *R. v. Searle*, 1 M. & Rob. 75; *R. v. Offord*, 5 C. & P. 168; *Com. v. Rogers*, 7 Met. (Mass.) 500; *Baxter v. Abbott*, 7 Gray, 71; *Delafield v. Parish*, 25 N. Y. 9; *Clark v. State*, 12 Ohio, 483; *Choice v. State*, 31 Ga. 424.

⁷ *Heald v. Thing*, 45 Me. 392.

⁸ *State v. Pike*, 49 N. H. 399; *Gahagan v. R. R.* 1 Allen, 187; *People v. Eastwood*, 14 N. Y. 562; *Pierce v. State*, 53 Ga. 365; *Stanley v. State*, 26 Ala. 26.

§ 418. When insanity is set up by a defendant and denied by the prosecution, an expert cannot be asked his opinion as to the evidence in the case as rendered, not only because this puts the expert in the place of the jury, in determining as to the credibility of the facts in evidence, but because the assistance thus afforded is in most trials only illusory, experts being usually in conflict; and the duty devolving on court and jury, of supervising the reasoning of experts, being one which can be rarely escaped.¹ It has been said, however, that when the facts are undisputed, the opinion of an expert can be asked as to the conclusions to be drawn from them;²

¹ *R. v. Higginson*, 1 C. & K. 129; *Sills v. Brown*, 9 C. & P. 604; *R. v. Frances*, 4 Cox C. C. 57; *R. v. Richards*, 1 F. & F. 87; *Dexter v. Hall*, 15 Wall. 9; *Willey v. Portsmouth*, 35 N. H. 303; *Perkins v. R. R.* 44 N. H. 223; *Woodbury v. Obear*, 7 Gray, 467; *Miller v. Smith*, 112 Mass. 475; *Dra- per v. Saxton*, 118 Mass. 431; *Brill v. Flager*, 23 Wend. 354; *People v. Mc- Cann*, 3 Parker C. R. 272; *State v. Powell*, 2 Halst. 244; *Kempsey v. Mc- Ginniss*, 21 Mich. 123; *Bishop v. Spin- ing*, 38 Ind. 143; *Phillips v. Starr*, 26 Iowa, 349; *Brown v. Com.* 14 Bush, 398; *State v. Medlicott*, 9 Kans. 257; *State v. Bowman*, 78 N. C. 509; *Choice v. State*, 31 Ga. 424; *Page v. State*, 61 Ala. 16. See, however, *State v. Hayden*, 51 Vt. 296, where a wider range was assigned.

² *McNaghton's case*, 10 Cl. & F. 200, 211, 212; 1 C. & K. 135; though see *R. v. Frances*, 4 Cox C. C. 57.

In Massachusetts, the topic in the text is thus discussed by Chief Jus- tice Shaw:—

“The opinions of professional men on a question of this description are competent evidence, and in many cases are entitled to great consideration and respect. The rule of law, on which this proof of the opinion of witnesses, who knew nothing of the actual facts

of the case, is founded, is not peculiar to medical testimony, but is, as a gen- eral rule, applicable to all cases where the question is one depending on skill and science in any particular depart- ment. In general, it is the opinion of the jury which is to govern, and this is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observa- tion and experience of men in general, but are quite within the observation and experience of those whose pe- culiar pursuits and profession have brought that class of facts frequently and habitually under their considera- tion. Shipmasters and seamen have peculiar means of acquiring knowl- edge and experience in whatever re- lates to seamanship and nautical skill. When, therefore, a question arises in a court of justice upon that subject, and certain facts are proved by other witnesses, a shipmaster may be asked his opinion as to the character of such facts. The same is true in regard to any question of science, because per- sons conversant with such science have peculiar means, from a larger and more exact observation, and long ex- perience in such department of sci- ence, of drawing correct inferences from certain facts, either observed by themselves or testified to by other wit-

and as to the conclusions to be drawn from the testimony of a particular witness;¹ and it is settled that experts of all classes

nesses. A familiar instance of the application of this principle occurs very often in cases of homicide, when, upon certain facts being testified to by other witnesses, medical persons are asked whether, in their opinion, a particular wound described would be an adequate cause, or whether such wound was, in their opinion, the actual cause of death in the particular case. Such question is commonly asked without objection; and the judicial proof of the fact of killing often depends wholly or mainly upon such testing of opinion. It is upon this ground that opinion of witnesses who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease at the time of its supposed existence. It is designed to aid the judgment of the jury in regard to the influence and effect of certain facts which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had, are of great weight, and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives it.

“One caution in regard to this point it is proper to give. Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified to by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witnesses is this: If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether in their opinion the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances.” *Com. v. Rogers*, 7 Met. 500. So also was it said by Chief Justice Chapman, in *Andrews's case* (1868): “You may put a hypothetical case, and ask whether it shows insanity, or, if the witness has heard all the testimony, whether the facts in his opinion indicate insanity. The witness, however, must not discriminate upon the facts, but assuming all the testimony to be true, he may state whether or no they indicate insanity.” *Com. v. Andrews*, Pamph. 182. See *Com. v. Wilson*, 1 Gray, 338. But the weight both of authority and argument is, that when there is a conflict of evidence the witness should be limited to a specific hypothetical case. See cases cited in this and prior note.

¹ *Hand v. Brookline*, 126 Mass. 324.

may be asked as to a hypothetical case.¹ But if the facts on which the hypothesis is based fall, the answer falls also.² Nor can an expert be asked as to an hypothesis having no foundation in the evidence in the case,³ or resting upon statements made to him by persons out of court.⁴

§ 418 *a*. It has been ruled that as a physician must necessarily, in forming his opinion, be to some extent guided by what the sick person may have told him in detailing his pains and sufferings, not only the opinion of the expert, founded in part upon such *data*, is receivable in evidence, but he may state what the patient said, in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestae*.⁵ Yet this is an exception to be jealously guarded; and even in civil issues, when there is reason to believe that the declarations in question may have been uttered in view of subsequent legal issues, they will be excluded.⁶ In criminal issues, where the temptation to fabricate evidence is so powerful, such declarations, when made after the defendant has had leisure to prepare himself for his defence, should be regarded with a scrutiny peculiarly close.

§ 419. An expert may be asked by either party as to the reasons on which his opinion is based; or he may, with leave of court, give such explanation on his own ac-

¹ *Dexter v. Hall*, 15 Wall. 9; *U. S. v. McGlue*, 1 Curtis, C. C. 1; *Sills v. Brown*, *ut supra*; *Spear v. Richardson*, 37 N. H. 23; *Fairchild v. Bascomb*, 35 Vt. 398; *Woodbury v. Obear*, 7 Gray, 467; *Com. v. Rogers*, 7 Met. 500; *Com. v. Rich*, 14 Gray, 335; *Erickson v. Smith*, 2 Abb. (N. Y.) App. 64; *Hoard v. Peck*, 56 Barb. 202; *Carpenter v. Blake*, 2 Lans. 206; *People v. Lake*, 2 Kernan, 358; *State v. Winsor*, 5 Harring. 512; *Negro Jerry v. Townshend*, 9 Md. 145; *Choice v. State*, 31 Ga. 424; *Griggs v. State*, 59 Ga. 738; *Davis v. State*, 35 Ind. 496; *Bishop v. Spining*, 38 Ind. 143; *Wright v. Hardy*, 22 Wis. 348; *Crawford v. Wolf*, 29 Iowa, 567;

McAllister v. State, 17 Ala. 434; *Wilkinson v. Moseley*, 30 Ala. 562; *Caleb v. State*, 39 Miss. 722; *State v. Klingler*, 46 Mo. 224; *Tingley v. Cowgill*, 48 Mo. 291; *North Mo. R. R. v. Akers*, 4 Kans. 453; *Dove v. State*, 3 Heisk. 348, and cases cited in prior notes to this section as to insanity.

² *Hovey v. Chase*, 52 Me. 304; *Thayer v. Davis*, 38 Vt. 163.

³ *Guetig v. State*, 66 Ind. 95; *Muldowney v. R. R.* 39 Iowa, 615; *State v. Stokeley*, 16 Minn. 282.

⁴ *Heald v. Thing*, 45 Me. 392.

⁵ *Supra*, § 272.

⁶ *Ibid.*; *Rowell v. City of Lowell*, 11 Gray, 420. See *Wetherbee v. Wetherbee*, 38 Vt. 454.

count.¹ Beyond this he cannot go in such examination ;² though he may be fully examined in details in order to test his credibility and judgment.³ Even on a reëxamination, he may be permitted to give explanations of facts transpiring since his examination in chief.⁴

opinion in
his exami-
nation.

§ 420. When expert testimony was first introduced, it was regarded with great respect. An expert, when called as a witness, was viewed as the representative of the science of which he was a professor, giving impartially its conclusions. Two conditions have combined to produce a material change in this relation. In the first place, it has been discovered that no expert, no matter how learned or how incorrupt, speaks for his science as a whole. Few specialties are so small as not to be torn by factions ; and often, the smaller the specialty, the bitterer and the more inflaming and distorting are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand, and to defend it with vehemence when off the stand. “*Nihil tam absurde dici potest, quod non dicatur ab aliquo philosophorum.*”⁵ In the second place the retaining of experts, by a fee proportioned to the importance of their testimony, is now, in cases in which they are required, as customary as is the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel, retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of impartial judgment ; and so intense is this conviction, that there is no civilized community in which a judge who receives a present from a suitor is not buried in disgrace. Hence it is that, apart from the partisan temper more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism

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ously scru-
tinized.

¹ *Keith v. Lothrop*, 10 Cush. 453.
Supra § 407.

⁴ *Farmers' Bk. v. Young*, 36 Iowa, 45.

² *Ingledeu v. R. R.* 7 Gray, 86.

⁵ *Cic. de Div. ii.* 58. See supra,

³ *Shaw v. Charlestown*, 2 Gray, 107 ;
Hunt v. Lowell, 8 Allen, 169. § 8 a.

would award to such utterances.¹ In adjusting this criticism a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak, not as to *fact*, but as to *opinion*; and who are selected, on all moot questions, either from their prior advocacy of, or from their readiness to adopt, the opinion to be proved. In this sense we may adopt the strong language of Lord Campbell, that "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."²

¹ See, to this effect, Neal's case, cited 1 Redfield on Wills, c. iii. § 13; Woodruff, J., Gay v. Ins. Co. 2 Big. Life Ins. Cas. 14; Brehm v. R. R. 34 Barb. 256; Grigsby v. Water Co. 40 Cal. 396; Watson v. Anderson, 13 Ala. 202; 1 Whart. & St. Med. Jur. (1873) §§ 190, 269. See supra, § 8 a. In 1 Am. Law Rev. 45 is a learned article on this topic by Professor Washburn.

As to the impropriety of the State feeing exclusively its own experts see supra, § 347.

² Tracy Peerage, 10 Cl. & Fin. 191. See also Winans v. R. R. 21 How. 101; American Middlings Co. v. Christian, 4 Dill. 459.

That in matters of physical science, experts, when they fairly and fully give the conclusions of such science, are to be regarded as contributing facts to the issue by which, if true, court and jury will be bound, has been already fully shown. It is otherwise, however, when they treat of psychological science, and especially of those branches of that science which discuss mental competency for the responsible performance of certain legal acts. Whatever may once have been the attitude of the courts in this respect, the present necessary tendency of the judicial mind is to regard the opinions of experts, on questions of responsibility, as of

weight only as arguments on which the court is ultimately to decide. As affording rules by which courts are to be bound, such opinions have ceased to be regarded as of any efficacy. Chief Justice Chapman, of Massachusetts, on the trial of Andrews, Pamph. R. 356, in 1868, said: "I think the opinions of experts are not so highly regarded now as they formerly were; for, while they often afford great aid in determining facts, it often happens that experts can be found to testify to any theory, however absurd." And Judge Davis, of the Supreme Court of Maine (Neal's case, cited 1 Redfield on Wills, c. iii. § 13), went so far as to say: "If there is any kind of testimony that is not only of no value, but even worse than that, it is, in my judgment, that of medical experts. They may be able to state the diagnosis of a disease most learnedly; but upon the question, whether it had, at a given time, reached such a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country." And Judge Redfield, on commenting on this case, says, that there seems to be "but one opinion as to the fact that this kind of testimony is extremely unsatisfactory.

§ 421. The practice has been to receive for what it is worth the testimony of an expert, when his observations are made *ex parte*, as when a chemist sent by one party examines, without notice to the other party, remains supposed to contain poison, or a physician is taken by

Especially
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. . . . We are more and more confirmed in an opinion that the difficulty comes largely from the manner in which the witnesses are selected. . . . If the State, or the courts, do not esteem the matter of sufficient importance to justify the appointment of public officers, . . . it is certain the parties must employ their own agents to do it; and it is perhaps almost equally certain, that if it be done in this mode it will produce two trained bands of witnesses, in battle array against each other, since neither party is bound to produce, or will be likely to produce, those of their witnesses who will not confirm their views." So, also, an eminent federal judge, Judge Woodruff, said to a jury in 1871, that "where the opinion (of experts) is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury. Testimony of experts of this latter description, and especially where the speculative and theoretical character of the testimony is illustrated by opinions of experts on both sides of the question, is justly the subject of remark, and has been often condemned by judges as of slight value. And like observations apply to a greater or less degree to the opinion of witnesses who are employed for a purpose and paid for their services; who are brought to testify as witnesses for their employers. . . . This condemnation is not always applicable; often it would be unjust. Where an expert of integrity

and skill states conclusions which are the necessary or even the usual results of the facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited." Woodruff, J., in *Gay v. Ins. Co.* 2 Big. Ins. Cas. 14.

Three remarkable trials in the United States in 1872 may be cited in illustration of the text.

Mrs. E. G. Wharton was tried in Maryland for the poisoning of General Ketchum; and the experts called by the State to prove poison were flatly contradicted by experts, of at least equal authority, called by the defence, who swore that neither in symptom nor in autopsy was poison shown. A few months later occurred the trial of Stokes for the murder of Fisk, in which experts, equal, at least in respect to number, contradicted each other directly on the question whether Fisk was killed by Stokes, or by the surgeons who endeavored to extract Stokes's balls. And in September, 1872, as if to exhibit this capriciousness in the strongest possible relief, followed in Pennsylvania the second trial of Dr. Schœppe. He was convicted, on the former trial, on the testimony of a single expert, of murder by poison; and it was not till after a delay of more than two years, and then only by legislative action, that a new trial was obtained. Then was it discovered that there was nothing in the prosecution's case. The expert on which it relied, though respectable and conscientious, had been guided by tests which recent science has shown to be worthless. The court

one party, also without notice to the other party, to visit a patient whose sanity is in dispute. In cases such as these, expert

ordered an acquittal, on the ground that there was not even a *prima facie* case of the *corpus delicti*.

The following is extracted from an address by Chief Justice Campbell, given at Michigan University in 1880 (21 Alb. L. J. 403) : —

“ This generation has also met with another infliction unknown to former ones. The unreasonable extension of sensational cases was once due mainly to the ambition of counsel and the vindictiveness of clients, in whose behalf counsel sometimes allowed themselves to become ministers of wrath and agents to do work that might have been cleaner. Courts were more or less to blame for not checking these vagaries, but courts are comparatively helpless unless counsel second them, and a judge cannot safely assume in advance that a mass of rubbish is to be put in the case. We now have frequent instances of controversies where court, counsel, and parties lose their importance for the time in presence of that remarkable phenomenon, the expert. There are quiet and modest men of science in all departments who say what they have to say clearly, concisely, and frankly, and who throw upon the case all the light in their power. But there are others who hold themselves out as standing experts, whose chief occupation is not in improving themselves by the honest practice of an art or profession, but in special preparation for the functions of witnesses, and who seldom correct their crude and extreme theories by that practical experience which is the only safeguard against the wildest extravagance. These persons, having first qualified themselves for impartial witnesses by accepting employment to

aid counsel in working up their case, and acting as their prompters, are too often allowed to turn the witness-box into an exhibition stage, and display their acquirements very liberally. In patent cases and poisoning cases and will cases it is altogether too common to let such men wander from the issue, and use their own choice in determining how far they will show off their knowledge and opinions. They are not usually lacking in self-esteem, and are treated in such a way as to make them feel as if they were the heroes of the occasion. It is every day's experience that any suit in which such witnesses appear will without fail be needlessly protracted, and almost as surely be muddled.”

On the other hand, in *Pannell v. Com.* 86 Penn. St. 260 (1878), the Supreme Court of Pennsylvania, after saying that the opinion of medical experts are of great value in insanity, ruled that it was error to charge a jury as follows: “ We question very much whether you will realize much, if any, valuable aid from them, in coming to a correct conclusion as regards the responsibility for crime by this prisoner.”

Mr. Erichson, an English surgeon, in a late article in the *Lancet*, after attempting to show that the trial of litigated issues in surgery should be transferred to a jury of experts, makes the following remarkable statement, which comes, let it be remembered, from a critic not averse to expert testimony, but seeking to clothe experts with judicial powers: —

“ There is no distinct precedent or rule of practice to guide the surgeon in the formation of his opinion. If all men were cut out of the same block; if all accidents produced exactly the

testimony is open to peculiar suspicion; and is likely, if the observations be surreptitious and clandestine, to prejudice the party under whose directions they are made.¹ Wherever notice of such observations to the opposing interests is practicable, then such notice should be given. On the other hand, when experts are appointed by the State, or by referees agreed on by the parties, and when the examinations made by such experts are not *ex parte*, but conducted with notice to the opposite party, then the testimony is entitled to great weight.² Hence it is the duty of experts to secure and use all available materials and opportunities of diagnosis; and if they do not, their testimony is secondary, *i. e.* is not the best that could be obtained, and on this ground, if not rejected by the court, should be submitted to the jury with many cautions.³

Of course the question of what is *ex parte* depends to some extent on the subject matter of the inquiry. In this view we may be permitted to analyze some of the topics on which experts are called.

§ 422. As *post-mortem* examinations generally take place under the direction of a coroner or other officer, immediately after death, and often before any particular person is pointed out as the future defendant, there cannot be *Post-mortem examinations.* notice to any actual opposing interest. To relieve the proceedings from suspicion, however, it is important that volunteers, unless appointed to watch the case by persons interested, should be excluded, and that the examination should be conducted by officers appointed by the State. When, however (*e. g.* in cases of poisoning), a body is exhumed after proceedings commenced,

same effects; if all patients had the same skilled surgical assistance and careful nursing; if there were the same freedom from care or the same amount of tenacity in all; if, in fact, all circumstances, moral and physical, were equal in individuals who were exactly alike, every surgeon would form the same opinion, and no conflict could occur. But as it happens that every one of these circumstances is unequal, and to what extent the inequality extends is not always easily ascertain-

ble, the surgeon has no positive data to go upon, and must often give a somewhat empirical opinion as to the future condition of the patient." London Law Times, April 18, 1878.

¹ See *State v. Hays*, 22 La. An. 89. *Infra*, § 777.

² See Whart. Crim. Law, § 821 *h* (7th ed.); *Heald v. Thing*, 45 Me. 392; *Parlange v. Parlange*, 16 La. An. 17.

³ See *Heald v. Thing*, 45 Me. 392; *Parlange v. Parlange*, 16 La. An. 17.

no examination should take place except in the presence of the representatives of both sides.¹ Nor should the result of such researches be admitted in evidence unless the identity of the subject matter be established.

§ 423. The examination of blood stains, in order to be entitled to weight, should be by public officers, on materials proved to have been untampered with; and on notice proved to the opposite side, if a party be charged with the offence. But the mere fact that such examination is *ex parte* does not exclude.²

§ 424. Experts, as is well known, may be permitted to testify to their opinion that certain writings are genuine; and in some courts they may do this merely on the comparison of the contested paper with standards admitted to be genuine. Ought such tests to be exhibited to experts *ex parte*? At first view the answer would be in the negative; yet, though it would be against both reason and precedent arbitrarily to exclude testimony of such inspection when *ex parte*, it would be wiser and more effective to reserve the exhibition of the test papers to the expert until he is under examination in the presence of the opposite counsel. Experience tells us that an expert in handwriting is apt to be preoccupied by the case of a party who consults him *ex parte*, and to carry the prejudice thus received through the whole case. The testimony of such experts, especially if employed at the outset as feed advisers, should be received with many scruples, not because it is intentionally false, but on account of the tendency of the mind, in all matters of criticism, to adopt the view most favorable to a client or friend.

§ 425. Experts may be received to decipher or interpret terms of art which the jury or court, without such explanation, would not understand. And for the same reason an expert will be admitted to ascertain the meaning of signs and words in a document, of ordinarily unintelligible characters; of signs, of abbreviations, and of local idioms.³

¹ But see *State v. Bowman*, 80 N. C. 432, where it was held that *post-mortem* examinations do not require the attendance of the defendant or his counsel to make their results admissible.

² See *State v. Knight*, 43 Me. 11. On this topic see fully *infra*, § 777.

³ *Steph. Ev. art. 91*; *Whart. on Ev. § 972*.

§ 426. We have already had occasion to observe that in many jurisdictions experts are entitled by law to special fees,¹ however much the fact that they are feed exclusively by the party calling them detracts from their credit.² But as a matter of law, such employment and remuneration do not render them inadmissible.³

Experts
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specially
feed.

VIII. DEFENDANTS AS WITNESSES.

§ 427. At common law, a defendant, at least in capital cases, is entitled to address the jury, at the conclusion of the case, giving his own story as to any relevant facts.⁴ In making this statement he is not subject to cross-examination. We have also the authority of Alderson, B., extending this right to cases not capital.⁵ But in England there have been rulings that where the party has counsel this right may be refused.⁶

Defendants
at common
law may
make
statements.

¹ See *supra*, § 347.

² See also comments in § 420.

³ *People v. Montgomery*, 13 Abb. (N. Y.) Pr. N. S. 207. See, however, *Lyon v. Wilkes*, 1 Cow. 591.

⁴ See Whart. Cr. Pl. & Pr. § 579.

⁵ *R. v. Malings*, 8 C. & P. 242.

The defendant, being on trial for shooting with intent to do grievous bodily harm, there having been no witnesses at the time of the offence, was allowed to make a statement before his counsel addressed the jury. Alderson, B., said: "I see no objection to his doing so; I have read the statement he made before the magistrates. I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement as one of the circumstances of the case. On trials of high treason the prisoner is always allowed to make his own statement after his counsel has addressed the jury. It is true that the prisoner's statement may often defeat the defence intended by his counsel;

but if so, the ends of justice will be furthered. Besides, it is often the genuine defence of the party, and not a mere imaginary case invented by the ingenuity of counsel." See *London Law Times*, April 13, 1878. As to Michigan see *infra*, § 436; *De Foe v. People*, 22 Mich. 224.

⁶ *Ibid.*; *R. v. Manzano*, 2 F. & F. 64; *R. v. Burdett*, Dears. C. C. 431; Whart. Cr. Pl. & Pr. § 579.

On the other hand, in *R. v. Dyer*, 1 Cox C. C. 113, and *R. v. Burrows*, 1 Cox C. C. 363, it was intimated that no such limitation should be applied. The following is from the *London Law Times* of Feb. 21, 1880, p. 301:—

"Upon one occasion, at the Devizes Assizes, a wandering Spaniard was indicted for the murder of a man living by himself, in a solitary cottage, the principal evidence being, the prisoner being found some days after the murder not far from the neighborhood wearing some of the clothes of the murdered man. At the conclusion of the case for the prosecution his coun-

§ 428. The law in this relation has been revolutionized in most of the United States by the enactment of statutes authorizing, though under various conditions, the examination of a defendant on trial in his own behalf. Taking these statutes in connection with those rehabilitating parties in civil actions as witnesses, we may state the following conclusions.¹

sel applied for permission to the prisoner to state the facts of his case; this permission was accorded by Mr. Baron Martin. As the Spaniard was ignorant of English, an interpreter interpreted for him, the effect of his statement being that the clothes he had on were given him by a tramp he met, who induced him to exchange them for his own. Counsel then addressed the jury for the accused; but in the result, the jury not believing the defence, the Spaniard was convicted, and afterwards executed, the learned judge many years afterwards expressing doubts as to the man's guilt, and sorrow that he had not summed up for an acquittal. Strange to say, down to the present time this practice has been treated as a novelty and an innovation upon the regular administration of criminal justice, and it has been reserved for Mr. Justice Hawkins to restore it to activity. At the recent Leeds Assizes two prisoners were charged with robbery with violence, and their counsel made the common complaint that the mouths of the prisoners were closed, and that they were unable to give their version of the affair, whereupon the learned judge interposed, remarking that the prisoners could make any statement they liked though not upon oath, and after consulting with Mr. Justice Lush, he decided that, though the prisoners were defended by counsel, he would allow them to make any statement they chose. He said: 'I think that though there are dicta of individual judges to be found in the

books that a prisoner when defended by counsel is not at liberty to make a statement to the jury, I ought not to be bound by such dicta, because there is no decision of any court of criminal appeal on the point. As a general principle, a prisoner may make his statement, and give his version of the transaction in respect of which he stands charged.' In that case the counsel first addressed the jury, and afterwards the prisoners made their statement as to the facts. It is certainly a subject of surprise that a practice so just in itself, and so capable of assisting in the ascertainment of truth, should not be better understood and more commonly adopted. The fairness of thus permitting a prisoner to make a statement before his counsel addresses the jury is apparent when it is remembered in how many cases legal guilt is sustained only by a presumption of law arising out of facts capable alone of explanation by the accused, as in the case of the recent possession of stolen property. It may be said that such explanation may be put hypothetically by the prisoner's counsel; but a mere hypothesis, and that too from an advocate, falls very far short of a positive assertion from the mouth of the accused himself."

¹ In Pennsylvania, under the Act of 3d April, 1872, the defendant was entitled to testify for himself only in misdemeanors. He was consequently excluded in cases where the indictment contained counts for felony. *Stevick v. Com.* 78 Penn. St. 400; *Hunter v. Com.* 79 Penn. St. 503.

§ 429. A party, it may be said generally, when he becomes a witness, is subject to the usual duties, liabilities, and limitations of witnesses.¹ The statute, for instance, does not affect the rule, that parol evidence cannot be received to vary a written contract.² So, also, a party may be examined as an expert.³ He may, *a fortiori*, be called to contradict statements made by witnesses for the prosecution.⁴ A party when so examined is also subject to the law which authorizes a party's admissions out of court to be used in evidence against him on trial;⁵ and if he suppresses facts, this may be urged against him.⁶

Are subject
to limita-
tions of
witnesses.

He can make no statement to the jury, in States where such statutes exist, unless as a witness under oath.⁷

Prior conviction of infamous crime, however, does not incapacitate him, as the statute entitles him to testify as an arbitrary universal right.⁸

As to his credibility the usual distinctions apply; though in States where credibility is exclusively for the jury it is error for the court to comment unfavorably on the credibility of parties.⁹ And he is *prima facie* entitled to as much credit when testifying for himself in a criminal, as when testifying for himself in a civil, suit.¹⁰

By Act 24th March, 1877, in the trial of all indictments, complaints, and other proceedings, in any court of criminal jurisdiction, against persons charged with the commission of misdemeanors and *felonies*, except felonies triable exclusively in the Court of Oyer and Terminer, the person so charged shall at his own request, but not otherwise, be a competent witness.

¹ Wheeldon v. Wilson, 44 Me. 11; Quimby v. Morrill, 47 Me. 470; McDaniel v. Robinson, 26 Vt. 316; State v. Arnold, 50 Vt. 316; Granger v. Bassett, 98 Mass. 462; Cowles v. Bacon, 21 Conn. 451; Roberts v. Gee, 15 Barb. 449; Donohue v. People, 56 N. Y. 208; Morrow v. State, 48 Ind. 432; State v. Rugan, 68 Mo. 214; State v. Thomas, 68 Mo. 605; People v. Russell, 46 Cal. 121; People v. Rodondo, 44 Cal. 558.

A defendant's statement goes to the jury for what it is worth. Brown v. State, 60 Ga. 210.

² Kelly v. Cunningham, 1 Allen, 473; Dillon v. Anderson, 43 N. Y. 231. See Whart. on Ev. § 955.

³ Dickenson v. Fitchburg, 13 Gray, 596.

⁴ Morrow v. State, 48 Ind. 432. See Donohue v. People, 56 N. Y. 208.

⁵ Hall v. The Emily Banning, 33 Cal. 522. *Infra*, § 685.

⁶ Stover v. People, 56 N. Y. 315.

⁷ Com. v. Scott, 123 Mass. 222. See *supra*, § 312.

⁸ Newman v. People, 63 Barb. 630.

⁹ Greer v. State, 53 Ind. 420. See Veatch v. State, 56 Ind. 182. *Infra*, § 435 *a*.

¹⁰ State v. Swain, 68 Mo. 605; State v. Rugan, 68 Mo. 214.

§ 430. A defendant, when thus sworn, subjects himself to the same liabilities on cross-examination as do other witnesses.¹ Thus on a trial for adultery, where the defendant and his alleged paramour, being examined on the stand, deny the act charged, it is competent to cross-examine them upon the intimacy of their mutual relations before and after the alleged act; and in particular as to their representations that they were man and wife, their residence in the same house nine months prior to the reputed birth of a child, and other criminating circumstances.² The defendant may be even cross-examined on the whole case, and not simply on what relates to his examination in chief,³ though this expansion of the liberty of cross-examination may not be sustained in those States in which strict rules of demarcation in this respect are maintained.⁴

§ 431. Ordinarily, as is elsewhere seen, a witness cannot be examined as to another person's motives.⁵ It is otherwise with a witness's own motives, as to which, when relevant, he is always open either to examination or cross-examination. Hence a party, when examined as a witness, may be asked as to his own motives or intentions, when these are material.⁶ Thus the defendant, setting up self-defence, is entitled to testify to the jury that at the time of the act he believed himself in danger of his life.⁷

¹ *State v. Wentworth*, 65 Me. 234; *Marx v. People*, 63 Barb. 618; *Fraulich v. People*, 65 Barb. 48; *Varonna v. Socarros*, 8 Abb. N. Y. Pr. 302; *Anable v. Anable*, 24 How. N. Y. Pr. 92; *Brubacker v. Taylor*, 76 Penn. St. 83; *Roddy v. Finnegan*, 43 Md. 490; *Brown v. State*, 60 Ga. 210; *State v. Clinton*, 67 Mo. 880; *Burden v. People*, 26 Mich. 162; *State v. Fay*, 43 Iowa, 651; *State v. Huff*, 11 Nev. 17; *State v. Harrington*, 12 Nev. 125.

² *Com. v. Curtis*, 97 Mass. 574. *Infra*, § 432.

³ *Livingston v. Keech*, 34 N. Y. Sup. Ct. 547. See *Holbrook v. Mix*, 1 E. D. Smith, 154.

⁴ *Com. v. Nichols*, 114 Mass. 285;

Com. v. Tolliver, 119 Mass. 312; *Malone v. Dougherty*, 79 Penn. St. 46. Compare comments of Bradley, J., *Rea v. Missouri*, 17 Wall. 542-51.

⁵ *Infra*, § 456.

⁶ *Wheeldon v. Wilson*, 44 Me. 1; *Quimby v. Morrill*, 47 Me. 470; *Lawton v. Chase*, 108 Mass. 241; *Snow v. Paine*, 114 Mass. 520; *People v. Pease*, 27 N. Y. 45; *Thurston v. Cornell*, 38 N. Y. 281; *Fiedler v. Darrin*, 50 N. Y. 437; *Kerrains v. People*, 60 N. Y. 221; *Babcock v. People*, 15 Hun, 347; *Greer v. State*, 53 Ind. 520; *White v. State*, 53 Ind. 595; *People v. Farrell*, 31 Cal. 576. See Whart. on Hom. § 520.

⁷ *State v. Harrington*, 12 Nev. 125.

§ 432. If a defendant offers himself as a witness to disprove a criminal charge, can he excuse himself from answering on the ground that by so doing he would criminate himself? This question has been much agitated since the passing of the enabling statutes; and the general conclusion is, that so far as concerns questions touching the merits, the defendant, by making himself a witness as to an offence, waives his privileges to all matters connected with the offence.¹ It has been ruled also that, to affect his credibility, he may be asked whether he has been in prison on other charges,² and whether he has suborned testimony in the particular case;³ though where there is no statute permitting such inquiries, and where the evidence does not go to motive or bias, answers as to collateral crimes should not be coerced.⁴

He cannot avoid relevant questions on the ground that the answer would criminate.

See Whart. Crim. Law, 8th ed. § 491. *Infra*, § 459.

A party, however, cannot be admitted to prove his intent so as to vary the terms of a document by which he is bound. *Dillon v. Anderson*, 43 N. Y. 231; *Harrison v. Kirke*, 38 N. Y. Sup. Ct. 396.

¹ *State v. Wentworth*, 65 Me. 234; *State v. Ober*, 52 N. H. 459; *Com. v. Lannan*, 13 Allen, 563; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Curtis*, 97 Mass. 574; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Nichols*, 114 Mass. 285; *Com. v. Tolliver*, 119 Mass. 300; *Burdick v. People*, 58 Barb. 51; *Fralich v. People*, 65 Barb. 48; *McGarry v. People*, 2 Lansing, 227; *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *State v. Fay*, 43 Iowa, 651; *State v. Huff*, 11 Nev. 17; *Barber v. State*, 13 Fla. 675. See, however, *People v. McGungill*, 41 Cal. 429.

² *Com. v. Bonner*, 97 Mass. 587. See *contra*, *Farley v. State*, 57 Ind. 331. See *infra*, § 474.

³ *Martineau v. May*, 18 Wis. 54.

⁴ *People v. Thomas*, 9 Mich. 321; *Gale v. People*, 26 Mich. 157. See,

however, *State v. Ober*, 52 N. H. 459; *Clark v. Reese*, 35 Cal. 89. *French v. Venneman*, 14 Ind. 282. See *infra*, § 468.

In *McGarry v. People*, 2 Lans. 227 (*infra*, § 470), Johnson, P. J., said:—

“He (the defendant) was a volunteer witness under the provisions of chapter 678 of the Laws of 1869. He was not only a volunteer, but had taken the necessary oath to enable him to testify, ‘to tell the truth, the whole truth, and nothing but the truth,’ upon the whole issue of traverse between himself and the People. He could not have been compelled to give evidence at all; but when he made himself a witness, under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor, and subjected himself to the peril of being examined as to any and every matter pertinent to the issue. Any other construction would render this statute the most effectual shield to crime and criminals which could possibly be devised.” *McGarry v. People*, 2 Lansing, 227, 232 (Johnson, P. J. 1870). In *Brandon v. People*, 42 N. Y. 265, decided in 1870,

Questions as to adultery, when this is at issue, are to be treated as are questions as to any other crime.¹

the law was thus stated: "The defendant invokes the aid of the legal principle, that on a criminal trial the character of the defendant cannot be attacked by the public prosecutor, unless the defendant himself first draws it into controversy, and that although the defendant here may have been a thief, she is nevertheless entitled to be judged by the same rules of evidence and of law, which are applied to the most virtuous person. These principles are quite correct. 1 Whart. Am. Cr. Law, 5th ed. p. 824; 5 Parker Cr. R. 105. The defendant, however, appeared before the court below in a double capacity, — that of an accused party on trial, and that of a witness. As an accused party on trial, she was entitled to the application of the rule, that her character could not be attacked unless she herself opened the question. She had the benefit of it, as the district attorney opened and closed his case without allusion to her character. She, however, chose to avail herself of the statute of 1869, which permitted her to make herself a 'competent witness' in the case. She was not compelled to take this position, the statute declaring that the failure to testify should not create any presumption against her. Stat. supra. She elected, however, to make herself a witness. She became and was a competent witness. For this purpose she left her position as a defendant, and, while upon the stand, was subject to the same rules, and called upon to submit to the same tests, which could by law be applied to other witnesses. Her statements were made to the jury under the solemnity of an oath. In theory of

law, this gave greater weight to her narration than if she had placed her simple declaration before the jury, unaccompanied by her oath. She cannot claim the advantages of the position of a witness, and at the same time avoid its duties and responsibilities. If one so testifying should testify to a wilful falsehood on a material point, I cannot doubt that the offence would be perjury. The character of party in the same case would afford no defence to such an accusation. In the minor effect of being subject to a like cross-examination with other witnesses, the rule is the same. The question was a proper one, and no suggestion of privilege being made, the objection was properly overruled. The question in *Newcomb v. Griswold* (24 N. Y. R. 298) was entirely different from the present. There was no question of an actual conviction here; and the point whether the offence could be proved by a verbal answer, or whether the record should be introduced, did not arise. The defendant was inquired of simply whether she had before been arrested for theft. Neither was the attention of the court or of the opposite counsel called to the question of the manner of proof, by record or otherwise."

In *Connors v. People*, 50 N. Y. 240, the defendant was asked on cross-examination, "How many times have you been arrested?" This was objected to, on the ground that the Constitution provides that "no man can be compelled to be a witness against himself," though there was no claim of privilege. The objection was held to have been properly overruled, on the authority of the *Brandon* case. The

¹ *Com. v. Curtis*, 97 Mass. 574.

Whether a defendant waives his privilege as to professional communications is hereafter discussed.¹

§ 433. A defendant, when a witness, may be contradicted as to matters material to the issue ;² but not as to matters collateral.³ So, as we have seen, he may be contradicted by proof of prior inconsistent statements,⁴ and

He may be contradicted on material

court said: "If he," the defendant, "gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His act was the primary cause, and if that was voluntary, he has no reason to complain."

People v. Casey, 72 N. Y. 393, affirms the two preceding cases just cited. *People v. Brown*, 72 N. Y. 571, is distinguished by the fact that the defendant here set up privilege, and this privilege was sustained by the court. In the course of his opinion Church, C. J., said: "I am of the opinion that the cross-examination of persons who are witnesses in their own behalf, when on trial for criminal offences, should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses." See examination of these cases in 19 Alb. L. J. pp. 343, 388.

In *Crapo v. People*, 76 N. Y. 288; 19 Alb. L. J. 200, the prisoner was required to answer, under objection, the question, whether he had been arrested for bigamy? This was held error by the Court of Appeals, although the witness did not claim his privilege. It did not, so it was held, tend to impair the credibility of the prisoner as a witness. *Brandon's case*, 42 N. Y. 265, and *Connors's case*, 50 Ibid. 240, distinguished. "Questions as to collateral matters tending to impeach the witness's credibility are admissible. *Parkhurst v. Lowten*, 2 Swanston, 216. This reason for allowing collateral inquiries of this nature, that otherwise the People may

be surprised by the unexpected appearance of a strange witness (2 Phil. on Ev. 943, 5th Am. ed.), does not apply to the case of the accused giving testimony in his own case. Collateral questions, not necessarily tending to impeach the witness's credibility, have uniformly been excluded. *People v. Genung*, 11 Wend. 19. The single fact that the witness has been complained of and held for trial for the commission of a crime, does not affect his moral character (*People v. Gay*, 7 N. Y. 378), because he is presumed innocent till convicted." *Folger and Earl, JJ.*, dissenting. S. C., 15 Hun, 269.

A defendant, when a witness on an indictment for rape, cannot be asked whether he had previously visited houses of ill-fame. *Gifford v. People*, 87 Ill. 210. But where the question put on cross-examination is as to a matter which the prosecution could put in evidence as part of its case, then the defendant is not in any view privileged from answering. The defendant may therefore be compelled to answer as to whether he did not commit certain other crimes which are part of a system with that under trial. *State v. Wentworth*, 65 Me. 234; *Com. v. Nichols*, 114 Mass. 285. *Supra*, § 32.

¹ *Infra*, § 499.

² *Fralich v. People*, 65 Barb. 48; *State v. Horne*, 9 Kans. 119. *Supra*, § 429.

³ *Marx v. People*, 63 Barb. 618. See *infra*, § 484.

⁴ *Supra*, §§ 429-31; *infra*, § 482;

points and this without previously questioning him as to such
may be statements.¹ His character for truth and veracity may
impeached. be impeached,² and his testimony may be commented on by
 counsel to the same effect as the testimony of other witnesses.³

§ 434. A party who has been examined in his own behalf
He may be may be reëxamined in rebuttal of the prosecution's tes-
reëxam- timony,⁴ and may be called to contradict, under the
ined. usual limitations, testimony offered on his own side,⁵ or
 to explain ambiguities in his own testimony.⁶ And it is held
 in New York that he may be asked by his counsel whether he
 was guilty of an offence of which he is shown by the record to
 have been convicted in another State.⁷ His credit, like that of
 all other witnesses, is for the jury.⁸

§ 435. In most States it is provided by the enabling statute
A failure that a failure by the defendant to offer himself as a wit-
on part of ness is not to be taken as a presumption against him.
the de- Independently of such provisions, it is proper for the
fendant to court, in all cases where the defendant declines to avail
offer him- himself of the right of testifying, to hold firmly to the
self as a position that no inference is to be drawn against him
witness is from such omission. Otherwise, exposing himself to
not to be this ordeal will become obligatory, and there will be a
treated as practical abrogation of the great constitutional and juridical prin-
a presump- ciple that no man is to be compelled to criminate himself. Fol-
against lowing this view, it has been held error for the judge trying the
him. case to decline to charge the jury that no presumption is to be
 drawn from such withholding.⁹ And it has been held, under

Brubacker v. Taylor, 76 Penn. St. 83; *Woods v. State*, 63 Ind. 353.

¹ *Infra*, § 483; *Kreiter v. Bomberger*, 2 Weekly Notes, 685. Compare *supra*, § 429; *Foster, in re*, 44 Vt. 570; *Laramore v. Minish*, 43 Ga. 282.

² *Com. v. Bonner*, 97 Mass. 587. *Infra*, § 486. But general inquiries into moral character are precluded. *Fletcher v. State*, 49 Ind. 124. *Supra*, § 432; *infra*, § 487.

³ *State v. Harrington*, 12 Nev. 125.

⁴ *Donohue v. People*, 56 N. Y. 208;

People v. Crapo, 76 N. Y. 288; *Rust v. Shackelford*, 47 Ga. 538.

⁵ *Hildreth v. Shepard*, 65 Barb. 265. See *infra*, § 493.

⁶ *Cousins v. Jackson*, 52 Ala. 262.

⁷ *Sims v. Sims*, 75 N. Y. 466. *Infra*, § 596 a.

⁸ *Supra*, § 429; *State v. Stewart*, 9 Nev. 130; *Brown v. State*, 60 Ga. 210.

⁹ *State v. Cameron*, 40 Vt. 555; *Beavers v. State*, 58 Ind. 530; *McKenzie v. State*, 26 Ark. 334; *People v. Tyler*, 36 Cal. 522. See *State v. Grebe*, 17 Kans. 458.

such circumstances, error, if the court, against the defendant's objection, permit the counsel for the prosecution, in addressing the jury, to comment on the omission as a circumstance against him, or a fact to be considered in determining the case.¹

In Maine, however, it is held that the judge, in his charge to the jury, may call their attention to the fact, and to instruct them that it is a circumstance for their consideration.² And in Vermont, while it is held proper to instruct the jury that the fact that the defendant has not offered himself as a witness is not to be received as a presumption against him, it is intimated that it would be attempting impossibilities to say that the fact is not to be taken into consideration at all.³ But ordinarily it is the duty of the court, if the question arises, to instruct the jury that the defendant's abstention affords no inference against him.⁴

§ 435 a. By some statutes counsel are prohibited from making any argument or comment on the silence of the defendant; and in such jurisdictions, if the counsel for the prosecution call attention to such silence, this is ground for new trial, even though counsel at the time is checked by the court.⁵ And new trials will be granted, even in States where counsel are not so prohibited, if the court permit such

Error for counsel to allude to non-testifying.

¹ *Infra*, § 435 a.

² *State v. Lawrence*, 57 Me. 574 (Appleton, C. J. 1870); *State v. Bartlett*, 55 Me. 200; *State v. Cleaves*, 59 Me. 298.

³ *State v. Cameron*, 40 Vt. 555.

⁴ In a remarkable trial for murder in New York, it was held that the error of the court in alluding, in its charge, to the omission of the prisoner to testify, was cured by a subsequent charge that he was not required to testify, and that there was no inference to be drawn against him from the fact of his not having testified. *Ruloff v. People*, 45 N. Y. 213; aff. S. C., 5 Lansing, 261. See comments in 19 Alb. L. J. 428.

In *Com. v. Scott*, 123 Mass. 239, the court said:—

“The absolute exemption, secured to the defendants by the Constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment, could not be affected by superfluous or irregular suggestions of their counsel in the heat of argument. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness.” See *Veatch v. State*, 56 Ind. 584, where it was held error to instruct a jury that persons “interested are not usually as honest and candid as one not so.”

⁵ *Long v. State*, 56 Ind. 182. *Supra*, § 429.

comments, in the face of objections from the defence.¹ This protection, however, from comment, does not apply to cases in which the defendant, submitting himself as a witness, declines to answer particular questions on the ground of self-crimination,² or fails to explain inculpatory facts.³ Nor is counsel prohibited from commenting on a defendant's appearance and manner when testifying.⁴

§ 436. In Michigan, the defendant's statement is not under oath. It is optional with him whether he will avail himself of the privilege of making any statement at all. *Distinctive provisions in particular States.*⁵ If he decline making any statement, no inference is to be drawn against him for the omission. The jury "are not to be precluded by any artificial rule from giving full weight to every consideration, or to any feature of such statement which may tend in any way to produce belief or disbelief, either of the statement itself, or of the evidence of witnesses to which it relates."⁶

It is proper to tell the jury, that in "weighing the credit due to the statement, they ought to consider it in connection with all the facts proved to their satisfaction, and with all the testimony and all the circumstances of the case. Such a statement, not being under oath, and being under very strong temptation to favor himself, should be subjected, at least, to all the scrutiny to

¹ *Ruloff v. People*, 45 N. Y. 213; *Crandall v. People*, 2 Lansing, 309; *Ormsby v. People*, 53 N. Y. 472; *Daily v. State*, 28 Ind. 285; *People v. Tyler*, 36 Cal. 522; *People v. Brown*, 53 Cal. 66.

In Ohio, where a defendant forebore to testify in his own behalf, and, during the argument, after closing of the evidence, contradicted the counsel for the prosecution on a question of fact, in the hearing of the jury, whereupon the counsel said to the defendant, "You had an opportunity to testify in this case and did not do so;" this was held to be no ground for a new trial, though the Ohio statute provides that refusal to testify shall not be used as a presumption against

the defendant. *Calkins v. State*, 18 Oh. St. 366.

² *State v. Ober*, 52 N. H. 459; citing *Com. v. Mullen*, 97 Mass. 547.

³ *Stover v. People*, 56 N. Y. 315.

⁴ *Huber v. State*, 57 Ind. 341. See 19 Alb. L. J. 429.

⁵ See a sketch of these statutes in 3 Cent. L. J. No. 49, p. 782.

In the United States courts, when there is no rehabilitating federal statute, a defendant in a criminal case cannot testify in his own behalf, although by statute his testimony is admissible in the courts of the State. *U. S. v. Hawthorne*, 1 Dill. 422.

⁶ *De Foe v. People*, 22 Mich. 224 — *Christianity, J.*, 1871. *Supra*, § 427.

which sworn testimony is subject.”¹ The statement is technically evidence against a defendant when involving admissions.²

The Florida Act of 1865 provides that the defendant may, *with leave of court*, make a statement under oath before the jury. Under this act it has been held error for the court, after such statement made, to charge the jury that they “cannot take such statement into consideration as evidence.” For, under the act, the *court* has only to determine whether the defendant is to make the statement; the *jury* may attach to the statement such weight as they think due.³ Under the Act of 1870, the defendant, by making a sworn statement, does not become a witness, nor subject to the liabilities of witnesses.⁴

§ 437. *Husband and wife* cannot, under the statutes, when not specifically included, be called as witnesses for each other, except in the usual case of violence. They are excluded on grounds of public policy; and the statutes do not touch this question when they only relieve from the exclusion attached to parties.⁵

Husband and wife not affected by statutes.

§ 438. *Co-defendants* may, under the statutes, be witnesses for each other.⁶

Otherwise as to co-defendants.

It is otherwise at common law.⁷

IX. ACCOMPLICES AND CO-DEFENDANTS.

§ 439. An accomplice is a competent witness for the prosecution,⁸ although his expectation of pardon depends upon the defendant's conviction,⁹ and although he is a co-defendant, provided in the latter case his trial is severed

Accomplices competent for prosecution.

¹ Christiancy, J., *People v. Jones*, 24 Mich. 217 (1872).

² *People v. Arnold*, 40 Mich. 710.

³ *Barber v. State*, 13 Fla. 675.

⁴ *Miller v. State*, 15 Fla. 591.

⁵ *Supra*, § 400.

⁶ *State v. Gigher*, 23 Iowa, 318.

⁷ *U. S. v. Clements*, 8 Hughes, 509. *Infra*, § 445. For constructions attached to defendant's testimony, in cases of homicide, where he sets up self-defence, see *Burdick v. People*, 58 Barb. 51. *Com. v. Woodward*, 102 Mass. 159.

⁸ Gilb. Ev. 136; 1 Hale, 303; 2

Hawk. P. C. 46, s. 94; Willes, 423; *Nixon v. People*, 5 Park. C. R. 119; *Mackesey v. People*, 6 Park. C. R. 114; *Lindsay v. People*, 63 N. Y. 143; *State v. O'Brien*, 3 Vroom, 414; *State v. Hudson*, 50 Iowa, 157. Compare *U. S. v. Henry*, 4 Wash. C. C. 428; *U. S. v. McKee*, 3 Dill. 546; *State v. Stanley*, 48 Iowa, 221; *People v. Gibson*, 53 Cal. 601; *Carroll v. State*, 5 Neb. 31; *Lee v. State*, 51 Miss. 566.

⁹ *R. v. Tonge*, Kel. 18; *State v. Cook*, 23 La. An. 45, and cases cited *supra*.

from that of the defendant against whom he is offered.¹ According to the English practice, as detailed by Mr. Roscoe,² it is not a matter of course to admit an accomplice to give evidence on the trial, even though his testimony has been received by the committing magistrates; but an application to the court for the purpose must be made.³ The court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus where several prisoners were committed as principals and several as receivers, but no corroboration could be given as to the receivers against whom the evidence of the accomplice was required, Gurney, B., refused to permit one of the principals to become a witness.⁴ The same distinction has been

¹ R. v. Gerber, T. & M. 647; Noyes v. State, 40 N. J. L. (12 Vroom), 429.

"It makes no difference whether the accomplice has been convicted or not, or whether he be joined in the same indictment with the prisoner to be tried or not; provided he be not put upon his trial at the same time. Hawk. P. C. b. 2, c. 46, s. 90. Where A., B., C., and D. were indicted together, after plea, and before they were given in charge to the jury, Williams, J., allowed D. to be removed from the dock and examined as a witness against his associates. R. v. Gerber, T. & M. 647." And see R. v. Gallagher, 13 Cox C. C. 61.

Whether wives of co-defendants can testify for each other is already considered, *supra*, § 391.

A prisoner who pleads guilty to an indictment, and who has been previously convicted of felony, is a competent witness against other prisoners charged in the same indictment. R. v. Drury, 3 C. & K. 190 — Rolfe; S.

P., R. v. Arundel, 4 Cox C. C. 260 — Patteson.

Two females being jointly indicted at the assizes for felony, the jury, not agreeing, was discharged by the judge from giving a verdict. At a subsequent assize, one was again put on her trial, and the other admitted to give evidence, without having withdrawn her plea of not guilty, and a *nolle prosequi* not having been entered. It was held that she was a competent witness. Winsor v. R. (in error), 7 B. & S. 490 — Exch. Cham.

² Roscoe Crim. Ev. 8th ed. 127.

³ 1 Phill. Ev. 28, 9th ed.

⁴ R. v. Mellor, Staff. Sum. Ass. 1833. So in R. v. Saunders, Worc. Spr. Ass. 1842, on a motion to admit an accomplice, Patteson, J., said: "I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification and there is no corroboration, that will not do." In R. v. Salt, Staff. Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to

maintained in this country ; it being held that the admission of an accomplice as a witness for the prosecution, upon an implied promise of pardon, rests on the discretion of the court, and not exclusively on that of the prosecution.¹ But this limitation can be properly applied, so far as it requires the consent of the court, only in those cases in which the accomplice is a co-defendant ; and even in such cases the court cannot intervene so as to exclude the accomplice under statutes which make co-defendants competent witnesses.²

§ 440. An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime.³ The coöperation in the crime must be real, not merely apparent.⁴ Hence, although a woman who coöperates voluntarily with others to produce an abortion on herself is an accomplice,⁵ it is otherwise when she is the victim of force, fraud, or undue influence.⁶ A by-stander, also, does not become an accomplice by mere approval of a murder committed in his presence.⁷

allow him to become a witness; 3 Russ. by Greav. p. 599, 4th ed.; and again in *R. v. Sparks*, 1 F. & F. 388, where the counsel for the prosecution applied for leave to call an accomplice who had pleaded guilty, Hill, J., refused to permit it until the other evidence had been given in order to see whether it was sufficient to corroborate that of the accomplice. See, to same effect, *People v. Whipple*, 9 Cow. 707; *Taylor v. People*, 12 Hun, 213.

¹ *Ray v. State*, 1 Greene (Iowa), 316; *Wight v. Rindskoff*, 43 Wis. 344.

"An accomplice is, in all cases, a competent witness for the prosecution, but whether in all cases he shall be permitted to become a witness, and thus earn an exemption from punishment which is the implied condition of his turning informer, and declaring the whole truth, is in the discretion of the court and of the prosecuting officer." *Allen, J., Lindsay v. People*, 63 N. Y. 153. See *Com. v. Smith*, 12 Met. 238; *Ray v. State*, 1

Greene (Iowa), 316; *Wight v. Rindskoff*, 43 Wis. 344; and *supra*, § 439.

In Arkansas the question is said to be for the discretion of the prosecuting attorney. *Runnels v. State*, 28 Ark. 121.

² See article in 19 Alb. L. J. 421.

³ *Dunn v. People*, 29 N. Y. 523. That the wife of an accomplice requires corroboration see *R. v. Neal*, 7 C. & P. 168.

⁴ *U. S. v. Henry*, 4 Wash. C. C. 428. That it must be established as a reality see *Matthews v. State*, 6 Tex. Ap. 23. That participation in a prize-fight is not such accompliceship as to require corroboration see *R. v. Hargrave*, 5 C. & P. 170.

⁵ *People v. Josslyn*, 39 Cal. 393.

⁶ *Com. v. Boynton*, 116 Mass. 343; *Dunn v. People*, 29 N. Y. 523; *State v. Hyer*, 39 N. J. L. 598; *Rafferty v. People*, 72 Ill. 37. See *Com. v. Wood*, 11 Gray, 86; *State v. Briggs*, 9 R. I. 361.

⁷ *State v. Cox*, 65 Mo. 29.

An *informer*, it has been held, is not technically an accomplice.¹ Hence one who purchases intoxicating liquor sold contrary to law, for the purpose of prosecuting the seller for an unlawful sale, is not an accomplice, so as to require distinct corroboration as such; though the jury should be instructed to receive his evidence with the greatest caution and distrust.² But the discredit of accompliceship does not attach to a detective who joins a criminal organization for the purpose of exposing it, even though, in order to aid in such exposure, he unites in and apparently promotes its counsels.³ It is otherwise if he acted as a decoy, in which case his testimony is to be rigidly scrutinized.⁴

¹ *State v. McKean*, 36 Iowa, 343; *People v. Farrell*, 30 Cal. 316; *People v. Barric*, 49 Cal. 342.

² *Com. v. Downing*, 4 Gray, 29. See *Dunn v. People*, 29 N. Y. 523; *Williams v. State*, 55 Ga. 391.

³ *Campbell v. Com.* 84 Penn. St. 187; *State v. McKean*, 36 Iowa, 343. See *R. v. Bernard*, 1 F. & F. 240; *R. v. Mullins*, 3 Cox C. C. 526; *Com. v. Wood*, 11 Gray, 86; *Com. v. Cohen*, 127 Mass. 282.

⁴ *Saunders v. People*, 38 Mich. 218.

In *Wright v. State*, 7 Tex. Ap. 574, Winkler, J., in delivering the opinion of the court, said: "The only question presented by the record is this: Is the uncorroborated testimony of a detective, of itself, sufficient to warrant a conviction? The judge who presided at the trial gave the jury the following charge as applicable to the witness who testified against the defendant: 'If you believe, from the evidence, that the witness Holden was present when the animal was taken by Bragg Wright, if it was taken by him, and aided, assisted, or encouraged said Wright in taking said animal, and his action therein was done with a criminal intent, you must acquit the defendant, unless you find that his evidence is corroborated by other evidence connecting the defend-

ant with the offence committed, and the corroboration is not sufficient if it merely shows the commission of the offence. If, however, you believe said witness was employed as a detective by the State of Texas, and was acting as such in ferreting out crime, and his action with the defendant at the taking of said animal was solely for the purpose of discovering crime, his evidence requires no corroboration; if you believe it sufficient to convict upon, you will receive it and act upon it the same as any other testimony.' We are of opinion that the court did not err in submitting the testimony to the jury, or in refusing a new trial on the ground that the verdict depended upon the testimony of this witness. We are not aware that this precise question has before been presented to any of the courts of last resort in this State. The time allowed us for investigation has afforded but few cases in other States. Cole, J., in *State v. McKean*, 36 Iowa, 343 (reported in 2 Green's Cr. L. R. 635), in treating of a similar subject, says: 'The authorities upon this question are few; indeed, there is but one case we have found in which the point was directly ruled. That case is *Rex v. Despard*, 28 Howell's State Trials, 346, 487.' There was found some

Accompliceship is to be proved inferentially; the question being one of fact for the jury.¹

§ 441. While, according to the English rule, a conviction on the uncorroborated testimony of an accomplice is legal,² the practice is uniform for the judge, when the question comes up, to instruct the jury that unless the accomplice be corroborated in such a way as to show the truth of his story, their duty is to acquit.³ The true course is, to use the language of Mr. Justice Talfourd,⁴ “for judges, in the exercise of a sound discretion, to direct the acquittal of a prisoner, unless the accomplice be corroborated by evidence admitting of no suspicion; not as to the whole case, for then the testimony would be needless, but as to such parts as satisfactorily show that he has not fabricated the story. And he should be confirmed in some facts affecting the individuals whom he accuses; for example, by showing the prisoner and the accomplice together under circumstances which were not likely to have occurred unless there had been concert between them;”⁵ because

Corrobor-
ation re-
quired to-
sustain.

difference between Despard's case and the one the judge was considering; but the judge, in deciding McKean's case, said: ‘The court left the credibility of the witness, and the weight to be given to his testimony, entirely to the consideration of the jury. Of these they were the proper judges. We do not see how we can interfere with the action of either court or jury.’ In *People v. Farrell*, 30 Cal. 316, it was held that the rule that a defendant cannot be convicted of a criminal offence on the testimony of an accomplice, unless the same is corroborated, does not apply to a feigned accomplice. On these authorities we hold, in the present case, that, first, the court did not err in submitting to the jury the questions, as to whether the witness Holden was an accomplice or not; and second, that the credibility of the witness being fairly submitted to the jury, and they having given full credence to the testimony,

the conviction will not be set aside, though resting mainly, if not entirely, on the testimony of a detective; otherwise the case is one of conflict of testimony.’”

¹ *Com. v. Elliott*, 110 Mass. 104; *Com. v. Ford*, 111 Mass. 394; *Com. v. Glover*, 111 Mass. 395; *State v. Schlagel*, 19 Iowa, 169.

² See *Atwood's case*, 1 Leach, 464; *Durham's case*, 1 Leach, 478; *R. v. Farlee*, 8 C. & P. 106.

³ *R. v. Dawber*, 3 Stark. 34 n.; *R. v. Jones*, 2 Camp. 131.

⁴ *Dick. Quar. Ses.* 9th ed. 504.

⁵ *R. v. Farler*, 8 C. & P. 106; where, in a case of night poaching, on 9 Geo. 4, c. 69, s. 9, the only confirmation of the accomplice's testimony was, that he and the prisoner were drinking together at a public house, commonly frequented by the prisoner, and left the house together when shut up for the night.

otherwise his whole narrative may be true in its circumstances, and abundantly confirmed, and yet false as to the alleged actors. But this is a mere matter for the discretion of the court; and there have been instances where, on consideration, it has been deemed proper to convict and to execute prisoners on the evidence of an accomplice who was confirmed as to others of the party, but not as to those executed."¹ On the other hand, in a case of great importance, where an accomplice swearing positively to several prisoners was confirmed as to some and not as to others, Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed.² "You may legally convict on the evidence of an accomplice alone," said Alderson, B., to a jury, "if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he be confirmed as to the particular person who is charged with the offence."³ "I think it would be highly dangerous," said Gurney, B., shortly afterwards, "to convict any person of such a crime (larceny) on the evidence of an accomplice, unconfirmed with respect to the person accused."⁴ In the United States, although we have occasionally expressions to the effect that technically an accomplice's unsupported testimony will sustain a conviction,⁵ the rule is generally adopted

¹ *R. v. Dawber*, 3 Stark. (N. P.) 34; *R. v. Jones*, 2 Camp. 133; *R. v. Birkett*, R. & R. 252; *R. v. Hastings*, 7 C. & P. 152; *R. v. Boyes*, 1 B. & S. 320.

² *R. v. Fild & others*, Berks Spring Assizes, 1828. To the same effect is *R. v. Wells*, M. & M. 326; *R. v. Moores*, 7 C. & P. 270; *R. v. Stubbs*, Dears. C. C. 555. *Infra*, § 442.

³ *R. v. Wilkes*, 7 C. & P. 272. So, also, in Vermont, *State v. Potter*, 42 Vt. 95; and in New York, *People v. Haynes*, 55 Barb. 450; 38 How. Pr. 369.

⁴ *R. v. Dyke*, 8 C. & P. 261; and see also *R. v. Stubbs*, 33 Eng. L. & Eq. 552 and 553; 7 Cox C. C. 48;

Dears. C. C. 555, where it was said that the rule in the text is not one of "law," but of "practice." A married woman who consents to her husband's committing an unnatural offence with her is an accomplice, and as such her evidence requires confirmation. *R. v. Jellyman*, 8 C. & P. 604. One prisoner who has pleaded guilty will not be allowed to be called as a witness against another, until the judge has heard the evidence necessary to corroborate that of an accomplice. *R. v. Sparks*, 1 F. & F. 388 — Hill.

⁵ *Steinham v. U. S.* 2 Paine C. C. 168; *Com. v. Price*, 10 Gray, 472; *State v. Stebbins*, 29 Conn. 463; *People v. Costello*, 1 Denio, 53; *People v. Davis*, 21 Wend. 309; *Brown v.*

that when a verdict is rendered exclusively on such testimony it should be set aside by the court, and that it is the duty of the judge on trial to advise the jury not to convict on the evidence of an accomplice who is uncorroborated.¹ In Pennsylvania, by statute, the uncorroborated evidence of an accomplice will not sustain a conviction.² And so is it in Georgia.³

State, 18 Oh. St. 496; *Stocking v. State*, 7 Ind. 326; *Nevill v. State*, 60 Ind. 308; *Johnson v. State*, 65 Ind. 269; *Earll v. People*, 73 Ill. 329; *State v. Brown*, 3 Strobb. 508; *Keithler v. State*, 10 S. & M. 192; *Dick v. State*, 30 Miss. 593; *White v. State*, 52 Miss. 216; *State v. Jones*, 64 Mo. 391; *State v. Betsall*, 11 W. Va. 703.

In *State v. Hyer*, 39 N. J. L. 598, it was said that it is the practice in our courts to advise juries against conviction on such testimony alone, and it is unlikely that any judge in a proper case would refuse to charge the jury, as the circumstances of the case required; still should a judge refuse so to do, error could not be assigned on such refusal, it being at his discretion.

¹ *U. S. v. Troax*, 3 McLean, 224; *U. S. v. Goldberg*, 7 Biss. 175; *State v. Howard*, 32 Vt. 380; *Com. v. Bosworth*, 22 Pick. 397; *Com. v. Price*, 10 Gray, 472; *Com. v. Snow*, 111 Mass. 411; *Com. v. Scott*, 123 Mass. 222; *Com. v. Grant*, Thach. C. C. 438; *State v. Wolcott*, 21 Conn. 272; *People v. Evans*, 40 N. Y. 1; *People v. Haynes*, 55 Barb. 450; S. C., 38 How. Pr. 369; *Carroll v. Com.* 84 Penn. St. 107; *Donnelly v. Com.* 6 Weekly Notes, 104; *Stocking v. State*, 7 Ind. 326; *State v. Willis*, 9 Iowa, 582; *State v. Schlegel*, 19 Iowa, 169; *State v. Thornton*, 26 Iowa, 79; *State v. Moran*, 34 Iowa, 453; *People v. Jenness*, 5 Mich. 305; *People v. Schweitzer*, 23 Mich. 301; *State v. Haney*, 2 Dev. & Bat. 390; *State v. Hardin*, 2 Dev. & Bat. 407; *Powers v. State*,

44 Ga. 209; *George v. State*, 39 Miss. 570; *Green v. State*, 55 Miss. 454; *State v. Watson*, 31 Mo. 361; *Craft v. State*, 3 Kans. 450; *State v. Bayonne*, 23 La. An. 78; *Irvin v. State*, 1 Tex. Ap. 301. See *State v. Kellerman*, 14 Kans. 135.

² Act of March 13, 1855.

³ *Childers v. State*, 52 Ga. 106.

The distinction existing between the English practice and that obtaining in several of the American courts is more apparent than real, and may be traced to the different methods of revision which exist in England and among us. In England, except on questions reserved by the judge at the trial, the only mode of revision is by an appeal to the mercy of the crown, by which, when successful, the disgrace is not detached, but only the penalty removed. In the United States, if a conviction based solely on an accomplice's testimony be obtained, the verdict would be instantly set aside, or at all events, the court in review would not hesitate to grant a new trial. Among the many advantages belonging to our system, perhaps one questionable practice may have grown up, and that is, of judges on trial reserving such points as the present, which it might be better for public example to summarily and definitely meet. If the question be still open, it may not be improper to suggest that, after all, the wiser and more humane course is always to tell the jury that if the accomplice be uncorroborated as to the person of the accused, they must acquit.

§ 442. The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since if corroboration in matters not connecting the accused with the offence were enough, a party who on the case against him would have no hope of an escape could, by his mere oath, transfer to another the conviction hanging over himself.¹ "There may be many witnesses therefore who give testimony which agrees with that of the accomplice, but which, if it does not serve to identify the accused parties, is no corroboration of the accomplice; the real danger being that the accomplice should relate the circumstances truly, and at the same time attribute a share in the transaction to an innocent person. It may indeed be taken that it is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks."² Where there

In Massachusetts, in 1877 (*Com. v. Scott*, 128 Mass. 222), it was declared to be well settled that a jury may convict upon the uncorroborated testimony of an accomplice if it satisfies them beyond a reasonable doubt of the guilt of the defendants. It was added, however, that it is the usual practice to advise the jury to acquit, if there is no other evidence; though if this rule of practice, because of its uniformity, has acquired the force of a rule of law, still there is not the same uniformity in the practice as to the kind of corroboration required. The weight of the corroborating evidence, it was held, is for the jury, and when there is such evidence upon matters material to the issue, there is no rule of law obliging the judge to instruct the jury to acquit, unless there is also corroboration of the statements connecting the defendants with the crime. The court cited *Com. v. Bosworth*, 22 Pick. 397; *Com. v. Brooks*, 9 Gray, 299; *Com. v. Price*, 10 Gray, 472; *Com. v. O'Brien*, 12 Allen, 188; *Com. v. Lar-*

abee, 99 Mass. 413; *Com. v. Elliot*, 110 Mass. 104; *Com. v. Snow*, 111 Mass. 411.

¹ See cases cited, § 441; *Com. v. Drake*, 124 Mass. 21; *State v. Wolcott*, 21 Conn. 271; *Carroll v. Com.* 84 Penn. St. 107; *State v. Graff*, 47 Iowa, 384; *State v. Adama*, 20 Kans. 311; *Childers v. State*, 52 Ga. 106; *Middleton v. State*, 52 Ga. 527; though see *State v. Watson*, 31 Mo. 361.

² *Roscoe's Cr. Ev.* 130; citing *Patterson, J.*, in *R. v. Addis*, 6 C. & P. 388; and, again, in *R. v. Kelsey*, 2 Lew. 45; by *Williams, J.*, in *R. v. Webb*, 6 C. & P. 595; by *Alderson, B.*, in *R. v. Wilks*, 7 C. & P. 272; and by *Lord Abinger, C. B.*, in *R. v. Farlar*, 8 C. & P. 106.

In the later case of *R. v. Stubbs*, 25 L. J. M. C. 16, *Dears. C. C.* 555, *Parke, B.*, said: "My practice always has been to tell the jury not to convict the prisoner, unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner;" and *Creswell, J.*, added:

is corroboration as to a part only of the defendants, the later practice, as is elsewhere seen more fully, is to direct an acquittal of the defendants to whom the corroboration does not extend.¹

“ You may take it for granted, that the accomplice was at the committal of the offence, and may be corroborated as to the facts ; but that has no tendency to show that the parties accused were there.”

What appears to be required is, that there should be some fact deposited to independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. Thus upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid. On the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen, and the skins were found in the place named by the accomplice. *Patteson, J.*, held that this was sufficient; the finding of the mutton in the possession of the prisoner in itself raising an implication of guilt on his part, which the testimony of the accomplice confirmed. *R. v. Birkett*, 8 C. & P. 732.

¹ *Supra*, § 441. Thus in *R. v. Stubbs*, *supra*, *Jervis, C. J.*, said: “ There is another point to be noticed: when an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the

judge to advise the jury, that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed; for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the transaction.”

In *Com. v. Scott*, 123 Mass. 222, the government claimed and was allowed to prove by one Edson, “ that in the year 1873 said Edson, the two defendants, and one William Conner, formed a general conspiracy to rob banks; that it was a part of their plan and understanding that, in their travels through the country, they should obtain information of such banks as were insecure and feasible for robbery, and should report to each other the result of their observations; that in the summer of 1875, Edson, who was in the employ of Herring & Co., of New York, safe-makers, and had been sent by them to Northampton on business of the company, first informed himself of the practicability of robbing the Northampton National Bank, and reported the same to the defendants at Wilkesbarre, Penn., and then furnished the defendants with the means of duplicating the vault lock; that this was done in pursuance of their general conspiracy before mentioned.” It was held competent for the government to show the whole history of the robbery charged, from the inception of the scheme to its final consummation. The evidence was admitted as tending to prove the crime charged, and was not rendered incompetent because it also tended to

§ 443. Though an accomplice, when called as a witness by the State, makes a clean breast, and exhibits all the facts in the case, however criminatory, he is not in law entitled to pardon; nor can he plead the fact that his testimony

Accomplice when entitled to pardon.

prove the commission of other crimes. *Com. v. Choate*, 105 Mass. 451. For the same reason, the testimony of Edson as to the acts of the defendants and their co-conspirators, in making preparations for carrying out the robbery was held competent. There being evidence sufficient to be laid before the jury to prove the conspiracy, as to which the presiding justice was in the first instance to determine, it was held proper for the government to put in evidence any acts of the several conspirators in furtherance of the common purpose of the conspiracy, either before or after the robbery was committed. Accordingly, Edson having testified without objection that a few days after the robbery he met the other conspirators on business connected with the robbery, the government was permitted to show by him that the conspirators had previously arranged for calling such meetings by means of "personals" in the *New York Herald*, and that this meeting was called by a "personal" inserted by him, in reply to which another was inserted by Conner. The insertion of these "personals" were acts of two of the conspirators in carrying out the purpose of the conspiracy, and were thus competent against the defendants. The newspaper was the best evidence of their insertion, and was important to fix the date of the meeting. For the same reasons a "personal," warning the defendant Scott of the danger of his visit to Northampton for the purpose of bringing to New York the securities stolen from the bank, was competent, and it was held immaterial whether Scott saw it. So, the

fact that Williams, a director of the bank, met Conner, one of the conspirators, and had negotiations with him relative to the return of the stolen property, was competent, and the fact that Edson took him to see Conner was admissible as a part of the transaction, as tending to corroborate Edson's testimony, that he and Conner were members of the conspiracy. The testimony of a witness called by the government, that about two days before the robbery he sold to two men in Springfield a pair of drawers and some socks, like those left by the robbers in the cashier's house (which was entered for the purpose of securing the keys of the bank), was competent, there being evidence tending to show that these two men were the defendants. Edson testified, without objection, that in August, preceding the robbery, he met the defendant Dunlap at Wilkesbarre, for the purpose of conferring together in regard to the robbery. The government introduced, against the defendant's objection, the register of the "Wyoming Valley House," of Wilkesbarre, and Edson testified to his own signature therein, under date of August 5, 1875, and that of Dunlap, under the assumed name of R. C. Hill. The court held that in any view this evidence was competent for the purpose of fixing the time when the interview took place.

The corroboration may be by facts as well as witnesses. *State v. Stanley*, 48 Iowa, 221.

Cross-examination is discussed *infra*, § 444.

was so invited and so used, in bar of a prosecution against him for the offence he confessed when on the witness stand. His claim to pardon depends exclusively on executive discretion.¹

On the trial of an indictment for breaking into a shop at night, evidence that a party of persons, among whom the defendant and A. B. were recognized, were seen at a late hour of the night near the shop, is corroborative of an accomplice who has testified that he was then and there with the defendant and A. B. *Com. v. Elliot*, 110 Mass. 104.

Confessions may form a sufficient corroboration. *People v. Cleveland*, 49 Cal. 578.

Where a witness is called, who, in the commencement of his testimony, states himself to be an accomplice of the accused, it has been held competent, before the witness is attacked, to call another witness to prove that the first had related the facts disclosed in his evidence immediately after they happened, and to state other confirmatory facts. *State v. Twitty*, 2 Hawks, 248.

But an accomplice who has testified to the defendant's guilt cannot be permitted, with a view to sustain his testimony, to narrate other instances of crime proposed to him by the defendant, though proposed at the same time, and in the same conversation. *Kinchelow v. State*, 5 Humph. 9.

¹ Whart. Cr. Pl. & Pr. § 536; *Com. v. Brown*, 103 Mass. 422; *Com. v. Woodside*, 105 Mass. 597; *State v. Lyon*, 81 N. C. 600.

"In the present practice (says Mr. Starkie), where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage,

lenity, and practice of the court is to stay the prosecution against them, and they have an equitable title to a recommendation to the king's mercy. 2 Starkie Ev. 4th Am. ed. 15. *Particeps criminis* in such a case, when called and examined as witnesses for the prosecution, says Roscoe, have an equitable title to a recommendation for the royal mercy, but they cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for the executive clemency. Roscoe's Cr. Ev. 9th Am. ed. 597. Authorities of the highest character almost without number support that proposition, nor is it necessary to look beyond the decisions of this court to establish the correctness of the rule. *Ex parte Wells*, 18 How. 312. Special reference is made in that case to the three ancient modes of practice which authorized accomplices, when admitted as witnesses in criminal prosecutions, to claim a pardon as a matter of right, and the court having explained the course of such proceedings, remarked that, except in those cases, accomplices, though admitted to testify for the prosecution, have no absolute claim or legal right to executive clemency. Much consideration appears to have been given to the question in that case, and the court held that the only claim the accomplice has in such a case is an equitable one for pardon, and that only upon the condition that he makes a full and fair disclosure of the guilt of himself and that of his associates, that

The accomplice, it has been ruled, cannot when afterwards put on trial, be granted a continuance of the case, so as to enable

he cannot plead it in bar of an indictment against him for the offence, nor use it in any way except to support a motion to put off the trial in order to give him time to apply for a pardon." Clifford, J., U. S. v. Ford, 99 U. S. 594.

In *State v. Graham*, 41 N. J. L. 15, the court came "to the conclusion to advise the attorney general not to enter a *nolle prosequi*. The public faith was not pledged to the defendant, either by expression or implication, that protection to this measure would be extended to him. An implied promise on the part of the court to recommend him to the mercy of the court of pardons is all that he can justly claim, and that pledge, if he should be convicted, will doubtless be redeemed. To what extent such recommendation will be efficacious, it will remain for the tribunal in which the Constitution has placed the pardoning power to decide. If the defendant should apply to be permitted to plead guilty to the crime of murder in the second degree, the court will listen to such application, and will there decide, when the matter is before it, what answer shall be given to such request. For the present, our decision is that the prosecution should not be summarily dismissed."

In this case, Beasley, C. J., stated the following rules:—

"*First.* That if an accomplice be convicted after having been made a witness by the State, and received as such by the court, and after having made an ingenuous confession, such accomplice has an equitable claim to a judicial recommendation to the mercy of the pardoning power, which cannot be withheld without a violation of an established rule of practice.

"*Second.* Such a recommendation

has been, without any known exception, hitherto effective in obtaining some remission of punishment.

"*Third.* That instead of the foregoing course it is competent for the court to order the accomplice to be acquitted at trial for the purpose of qualifying him as a witness, or to accept from the defendant a plea admitting guilt to such a degree as in the opinion of the court is requisite, or for the court to assent to the entering of a *nolle prosequi* by the attorney general."

For a discussion of the right of an accomplice to pardon see 17 Alb. Law J. 420 *et seq.*

Where an accomplice who had been admitted as a witness against his companions, on a charge of highway robbery, and had conducted himself properly, was afterwards tried himself for burglary, Garrow, B., submitted the point to the judges, whether he ought to have been tried after the promise of pardon; but the judges were all of opinion, that though examined as a witness for the crown, on the application of the counsel for the prosecution, there was no legal objection to his being tried for any offence with which he was charged, and that it rested entirely in the discretion of the judge whether to recommend a prisoner in such a case to mercy. *R. v. Lee*, R. & R. 364, 1 Burn, 212; *R. v. Brunton*, Ibid. 454, S. P. With respect to other offences, the witness is not bound to answer on his cross-examination. *Infra*, § 441; *R. v. West*, Phill. Ev. 28, 8th ed. (n.)

The United States district attorney, it is ruled, has no right to contract for the exemption of an accomplice, turning informer, from punishment. *U. S. v. Ford*, 99 U. S. 594.

him to apply for pardon.¹ It is the practice in England, in such cases, where the accomplice appears to have been the dupe, and where his services on the trial were valuable, to grant a pardon; though even if there be no other objection, the pardon will be withheld if he fenced on trial, or withheld part of the facts.² In some jurisdictions this is provided by statute. When the accomplice, after making a confession under promise of pardon, refuses to testify, the confession may be subsequently put in evidence against him.³ Nor can he, if he disclose part of the facts, withhold the rest. He must tell the whole.⁴

Where the case against the accomplice is withdrawn from the jury, and he is called as a witness, this operates as a bar to a further prosecution for the same offence.⁵ And where an accomplice tells everything candidly and fully on the trial of his confederate, the court, when allowed by statute, may approve the entering of a *nolle prosequi* against him.

§ 444. Great latitude, from the nature of the case, is allowed in the cross-examination of an accomplice, and the most searching questions are permitted in order to test his veracity.⁶ He will be compelled to make a full state-

Latitude
allowed in
cross-ex-
amining.

¹ Dabney's case, 1 Robin. Va. 696; though see Clifford, J., U. S. v. Ford, *ut supra*; U. S. v. Lee, 4 McLean, 103.

² R. v. Garside, 2 Lew. C. C. 38; U. S. v. Lee, 4 McLean, 103.

When a defendant who pleaded guilty, and was called as a witness for the prosecution, fenced with the questions put to him, he was told by Baron Wood that he would be sentenced because of this fencing. Alderson, B., R. v. Hincks, 2 C. & K. 464; S. C., 1 Den. C. C. 84.

The admission of an accomplice as a witness for the State does not *per se* bind the State not to prosecute; and if the accomplice, "being admitted as a witness, fail to testify the whole truth in good faith, the implied promise of pardon is revoked." Ryan, C. J., in Wight v. Rindskopf, 43 Wis. 349, citing R. v. Rudd, 1 Leach C. C.

115; People v. Whipple, 9 Cow. 707. See Runnels v. State, 28 Ark. 121; and article in Cent. Law J. June 16, 1876.

³ Com. v. Knapp, 10 Pick. 478. See, to same effect, R. v. Moore, 2 Lew. C. C. 37; R. v. Gilles, 11 Cox C. C. 69.

⁴ Com. v. Knapp, 10 Pick. 478; Com. v. Price, 10 Gray, 472; Alderman v. People, 4 Mich. 414; State v. Condry, 5 Jones (N. C.), 418. See fully *infra*, § 470.

⁵ People v. Bruzzo, 24 Cal. 41. See Lindsay v. People, 63 N. Y. 153; Ray v. State, 1 Greene (Iowa), 316.

⁶ Lee v. State, 21 Oh. St. 151.

It has been said that where the accomplice, on a former occasion, denied on oath all knowledge of the facts to which he testifies at the trial, yet this goes only to his credit; and if the jury find a verdict of conviction on his

ment of the matter he opens, criminate him though it may,¹ though he will not be required to answer as to other crimes.²

§ 445. At common law, an accomplice, not a co-defendant, is always a competent witness for the defendant on trial.³ But when indicted jointly with the defendant on trial, although he has pleaded and defended separately, he is not, at common law, a competent witness for his co-defendants, unless immediately acquitted by a jury, or a *nolle prosequi* be entered; and the same rule applies to accessories.⁴ Whether the trial be joint or several the rule is said to be the same,⁵ and wherever one defendant is not permitted to testify for the others, the wife of such defendant is excluded at common law, although her husband be not then on trial.⁶ But there is high authority to the effect that in cases where the trials are separate, and where the acquittal of one defendant does not involve the acquittal of the other, the latter may be examined, if he is willing, for his co-defendant.⁷

testimony, and the trial court be satisfied with the verdict, an appellate court will not set it aside. *Brown v. Com.* 11 Leigh, 711.

¹ *Com. v. Price*, 10 Gray, 472; *Alderman v. People*, 4 Mich. 414; *Hamilton v. People*, 29 Mich. 173. *Infra*, § 470.

² *R. v. West*, Phil. Ev. 28, 8th ed. (n.); *Pitcher v. People*, 16 Mich. 142.

³ *R. v. Bilmor*, 1 Hale P. C. 305. See *Salander v. People*, 2 Col. T. 48.

⁴ *Staup v. Com.* 74 Penn. St. 463; *Kehoe v. Com.* 85 Penn. St. 127; *Davis v. State*, 38 Md. 15, 46; *State v. Mooney*, 1 Yerg. 431; *State v. Calvin*, 1 Charlton, 151.

⁵ *Winsor v. R. L. R.* 1 Q. B. 390; *State v. Young*, 39 N. H. 283; *Com. v. Marsh*, 10 Pick. 57; *Com. v. Eastman*, 1 Cush. 189; *People v. Bill*, 10 Johns. 95; *People v. Donnelly*, 2 Park. C. R. 182; *People v. Williams*, 19 Wend. 377; *People v. McIntyre*, 1 Parker C. R. 372; *S. C.*, 5 Seld. 38; *Shay v. Com.* 36 Penn. St. 305; *Staup*

v. Com. 74 Penn. St. 458; *Kehoe v. Com.* 85 Penn. St. 127; *State v. Smith*, 2 Ired. 402; *State v. Edwards*, 19 Mo. 677; *Chandler v. Com.* 1 Bush, 41; *State v. Mooney*, 1 Yerg. 431; *State v. Dumphrey*, 4 Minn. 438; *Brown v. State*, 24 Ark. 626.

⁶ *Supra*, § 391.

⁷ *U. S. v. Henry*, 4 Wash. C. C. 428; *Moffitt v. State*, 2 Humph. 99; *Marshall v. State*, 8 Ind. 498; *Hunt v. State*, 10 Ind. 69; *Brown v. State*, 18 Oh. St. 496; *Laughlin v. Com.* 13 Bush, 261; *Christian v. Com.* 13 Bush, 264; *McKenzie v. State*, 24 Ark. 636; *People v. Labra*, 5 Cal. 183; *People v. Newberry*, 20 Cal. 439; *Garrett v. State*, 6 Mo. 1; *State v. Stotts*, 26 Mo. 307; *Blennerhasset v. State*, 1 Walk. 7; *Moss v. State*, 17 Ark. 327.

By the Code of Virginia, p. 752, § 21, it is provided that "no person, who is not jointly tried with the defendant, shall be incompetent to testify in any prosecution, by reason of interest in the subject matter thereof." See *Lazier's case*, 10 Grattan,

On a joint trial, when a motion is made by one defendant for a direction to the jury to acquit another defendant on the ground that there is no evidence against him, so that he can be a witness for the party making the motion, it is for the court to determine whether sufficient evidence exists.¹ And no exception lies to such refusal.²

A co-defendant or accomplice, who has pleaded guilty or been convicted, provided he is not thereby rendered infamous, is a competent witness for his co-defendants, supposing the case against him to be closed.³ But as long as the case, as far as he is concerned, continues open, he is at common law disqualified in all cases in which he would have been disqualified if called on trial.⁴

A joinder of defendants, unless the offence be joint, does not work such disability.⁵

Under the statutes removing disability of defendants, one defendant may be a witness for his co-defendant, to the same effect as he could be a witness for himself.⁶

The questions of misjoinder of defendants, and of a right to a new trial after acquittal, are discussed in another volume.⁷

717. And so in Ohio. Code Crim. Proc. 146.

¹ U. S. v. Gibert, 2 Sumner, 20; U. S. v. Wilson, 1 Bald. 78; State v. Soper, 16 Me. 298; People v. Howell, 4 Johns. 296; People v. Vermilyea, 7 Cow. 108; Com. v. Manson, 2 Ashm. 32; Bixbie v. State, 6 Ham. 86; State v. Smith, 2 Ired. 402; State v. Wise, 7 Rich. 412; Brister v. State, 26 Ala. 109.

² U. S. v. Marchant, 12 Wheat. 480; Com. v. Robinson, 1 Gray, 555. See Shay v. Com. 36 Penn. St. 305.

³ R. v. Ford, 2 Salk. 689; R. v. George, C. & M. 111; State v. Jones, 51 Me. 126; Com. v. Smith, 12 Met. 238; Carpenter v. Crane, 5 Blackf.

119; State v. Stotts, 26 Mo. 307; De-lozier v. State, 1 Head, 45; Bullard v. Noaks, 2 Pike, 45.

⁴ State v. Young, 39 N. H. 283.

In Kehoe v. Com. 85 Penn. St. 127, it was ruled that one who has been tried and convicted of an infamous crime, but not sentenced, in whose case motions for arrest of judgment and a new trial are pending, is not a competent witness for one who was jointly indicted with him for the same offence, but granted a separate trial.

⁵ Strawhern v. State, 37 Miss. 422.

⁶ State v. Gigher, 23 Iowa, 318. Supra, § 427.

⁷ Whart. Cr. Pl. & Pr. §§ 301 *et seq.*, 873-4.

X. EXAMINATION OF WITNESSES.

§ 446. Witnesses may, by order of court, be sequestered, due ground being shown, in such a way as may prevent those not yet examined from hearing the testimony of witnesses on the stand.¹ Whoever is yet to be examined, though party or prosecutor, is subject to this rule.² A witness's testimony, it is true, will not be necessarily ruled out because he remains in court, even wilfully, after being ordered to withdraw;³ but he exposes himself, by his disobedience, to an attachment for contempt.⁴ But where the party calling the witness is to blame for the disobedience, then the witness may be excluded.⁵ To prevent a witness from being unduly influenced by the knowledge of the line to which his testimony is expected

¹ *Southey v. Nash*, 7 C. & P. 682; *Selfe v. Isaacson*, 1 F. & F. 194; *People v. Duffy*, 1 Wheel. C. C. 123; *People v. Green*, 1 Parker C. R. 11; *State v. Zellers*, 2 Halst. 220; *Erissman v. Erissman*, 25 Ill. 136; *Johnson v. State*, 2 Ind. 652; *Benaway v. Conyne*, 3 Chandl. 214; *Nelson v. State*, 2 Swan, 237; *Thomas v. State*, 27 Ga. 287; *Bird v. State*, 50 Ga. 585; *State v. Sparrow*, 3 Murph. 487; *McLean v. State*, 16 Ala. 672; *State v. Brookshire*, 2 Ala. 303; *State v. Fitzsimmons*, 30 Mo. 236; *People v. Sprague*, 53 Cal. 422. See Whart. Cr. Pl. & Pr. § 569; and see *State v. Hopkins*, 50 Vt. 316; *People v. Garnett*, 29 Cal. 622.

² *R. v. Newman*, 3 C. & K. 252.

³ *Thomas v. David*, 7 C. & P. 350; *Chandler v. Horne*, 2 M. & R. 423; *Cobbett v. Hudson*, 1 E. & B. 14; *Hopper v. Com.* 6 Grat. 684; *Gregg v. State*, 3 W. Va. 705; *Laughlin v. State*, 18 Ohio, 99; *Porter v. State*, 2 Ind. 435; *Grimes v. Martin*, 10 Iowa, 347; *State v. Hare*, 71 N. C. 591; *State v. Fitzsimmons*, 30 Mo. 236; *Keith v. Wilson*, 6 Mo. 434; *State v. Salge*, 2 Nev. 321; *Davenport v. Ogg*, 15 Kans. 363; *Pleasant v. State*, 15 Ark. 624;

Montgomery v. State, 40 Ala. 684; *Bell v. State*, 44 Ala. 393; *Sartorius v. State*, 24 Miss. 602; *People v. Boscowitch*, 20 Cal. 436. The proper view (*Wilson v. State*, 52 Ala. 299) is, that the examination of the witness in such case is discretionary with the court. In 2 Phill. on Evid. (5th Am. ed.) 744, it is said: "If a witness, who has been ordered to withdraw, continues in court, it was formerly considered to be in the judge's discretion whether or not the witness should be examined. But it may now be considered as settled, that the circumstance of a witness having remained in court, in disobedience to an order of withdrawal, is not a ground for rejecting his evidence, and that it merely affords matter of observation." The old rule was always to exclude the testimony. *R. v. Wylde*, 6 C. & P. 38. Compare Whart. Cr. Pl. & Pr. § 569.

⁴ *Chandler v. Horne*, 2 M. & Rob. 423; *Bell v. State*, 44 Ala. 393; *People v. Boscowitch*, 20 Cal. 436; Whart. Cr. Pl. & Pr. §§ 948 *et seq.*

⁵ *Dyer v. Morris*, 4 Mo. 214; *Bird v. State*, 50 Ga. 585.

to reach, it has even been held that the court will order his withdrawal during a legal argument in respect to his evidence.¹ But this goes too far, since it would require witnesses to leave the court whenever the counsel calling them states, as he constantly is compelled to do, what he intends to prove by questions he may put. Yet in all cases where there is reason to believe that a willing witness is waiting to catch his instructions from counsel, the witness should be excluded. The rule, however, will be made to bend as far as possible to the convenience of the witness. Thus experts and other persons engaged in assisting counsel may be permitted to remain in court until the expert testimony begins;² and to attorneys it is especially conceded that they may be excused, when personally required in court, from such withdrawal.³ And it has also been ruled that a witness whose testimony is sought to be impeached has a right to be in court, notwithstanding a rule of general exclusion.⁴

§ 447. By the old practice, when the object was to test a witness's competency, the witness was examined on the *voir dire*.⁵ It is now settled that the issue of competency can be put at any time during the examination,⁶ and hence the recent practice is to swear the witness in chief, and to proceed to examine him as to competency.⁷

Voir dire
a preliminary test.

§ 448. "Although," says Mr. Roscoe,⁸ "a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment,⁹ yet it is usual to do so, in order to afford the prisoner's counsel an opportunity to cross-examine them;¹⁰ and if the prosecutor

All witnesses on back of indictment must be produced,

¹ *R. v. Murphy*, 8 C. & P. 307; *Selfe v. Isaacson*, 1 F. & F. 194; *Nelson v. State*, 2 Swan, 237.

² *Alison's Pract. Cr. L.* 489; *Taylor's Ev.* § 1260; *Com. v. Hersey*, 2 Allen, 174; *Thomas v. State*, 27 Ga. 287.

³ *Everett v. Lowdham*, 4 C. & P. 91; *Pomeroy v. Baddely*, R. & M. 430.

⁴ *U. S. v. Hanway*, Phil. 1852; *Pamph. R.* 144; *S. C.*, 2 Wall. Jr. 143.

⁵ *Whart. on Ev.* § 493; *Roscoe's Ev.* 8th ed. 136.

⁶ *Ibid.*

⁷ *Stone v. Blackburne*, 1 Esp. 37; *Jacobs v. Layburn*, 11 M. & W. 685; *Butler v. Tufts*, 13 Me. 302; *Fisher v. Willar*, 13 Mass. 379; *Seeley v. Engell*, 17 Barb. 530. See, however, *Lewis v. Moore*, 20 Conn. 211; *Houser v. Com.* 51 Penn. St. 332, indicating a contrary practice.

⁸ *Crim. Ev.* 8th ed. 136.

⁹ *R. v. Simmonds*, 1 C. & P. 84. *R. v. Whitbread*, *Ibid.* 84.

¹⁰ *R. v. Simmonds*, *supra*.

and so of
all witnesses
to transac-
tion.

would not call them, the judge in his discretion might.¹ The judges, however, have now laid down a rule, that the prosecutor is not bound to call witnesses merely because their names are on the back of the indictment, but that the prosecutor ought to have all such witnesses in court, so that they may be called for the defence, if they are wanted for that purpose. If, however, they are called for the defence, the person calling them makes them his own witnesses.”² The prosecution is usually bound to call all the attainable witnesses to a transaction which is the subject of examination. Thus, on a trial for murder, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined on the part of the prosecution, Patteson, J., directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the other side. “Every witness,” he said, “who was present at a transaction of this sort, ought to be called; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter.”³

¹ Ibid.; *R. v. Taylor*, Ibid. n.; *R. v. Bodle*, 6 C. & P. 186.

² *R. v. Woodhead*, 2 C. & K. 520; per Alderson, B. And see *R. v. Cassidy*, 1 F. & F. 79; from which it appears that Parke, B., Cresswell, J., and Lord Campbell, C. J., agree in this ruling.

The court, it is held, has no power to oblige a prosecutor to give to a defendant the additions and places of residence of witnesses named on the back of an indictment. *R. v. Gordon*, 2 Dowl. 417; S. C., 12 Law J. M. C. 84.

As to the practice of indorsing witnesses on indictment, before presentment to grand jury, see Whart. Crim. Pl. & Pr. § 358. That the judge will require all the indorsed witnesses to be called only in extreme cases see *R. v. Edwards*, 3 Cox C. C. 82; though see, as holding that the defendant may

insist on this, *R. v. Bailey*, 2 Cox C. C. 191.

Though the counsel for the prosecution may content himself with putting into the box a witness whose name is on the back of the bill, without asking him any questions on the part of the prosecution; yet it is better that he should be examined, whether his evidence is favorable to the prosecution or not, as the only object of the investigation is to discover the truth. *R. v. Bull*, 9 C. & P. 22.

³ *R. v. Holden*, 8 C. & P. 609. See also *R. v. Stroner*, 1 C. & K. 650. “And it seems,” continues Mr. Roscoe (*Criminal Ev.* 136), “that the same course should be pursued even when the party is a near relative of the prisoner, as a brother (*R. v. Chapman*, 8 C. & P. 559); or a daughter (*R. v. Orchard*, Ibid. n.).” In *R. v.*

§ 449. Sworn interpreters, in criminal as well as in civil cases, are to be appointed by the court where the witnesses do not understand the English language. It may be added that the accuracy of the interpretation of the sworn interpreter may be impeached, and is ultimately to be determined by the jury.¹ A witness, without being specially sworn, may interpret foreign terms used by himself.² When a witness can only speak in a whisper, the court may appoint a suitable person to repeat to the jury what is said by the witness.³

Interpreters to be sworn.

§ 450. A court of record has power to commit for contempt a witness who refuses to answer a question determined by the court to be proper.⁴ The same practice exists where the witness refuses to be sworn, or misbehaves when giving evidence.⁵

Witness refusing to answer punishable by attachment.

§ 451. A witness will not be relieved from the costs and penalties of an attachment by the allegation that his testimony was irrelevant, and that therefore he did not attend court, or did not answer.⁶ But if it appear, on hearing of the rule, that his testimony would be irrele-

Witness is no judge of materiality of his testimony.

Holden, it appeared that three surgeons had examined the body of the deceased, and that there was a difference of opinion among them. Two of them were called for the prosecution, but the third was not, and as his name was not on the indictment, the counsel for the prosecution declined calling him. Patteson, J., said: "He is a material witness who is not called on the part of the prosecution, and as he is in court I shall call him for the furtherance of justice." He was accordingly examined by the learned judge.

That the prosecution should call all persons cognizant of the facts is laid down in *Hurd v. People*, 25 Mich. 405; *People v. Gordon*, 40 Mich. 716; *State v. Smallwood*, 75 N. C. 104; and see Whart. Crim. Pl. & Pr. § 565; *State v. Magoon*, 50 Vt. 338. But redundant testimony need not be thus called. *Winsett v. State*, 56 Ind. 26.

¹ *U. S. v. Gibert*, 2 Sumner, 19; *Schnier v. People*, 23 Ill. 17. As to New York practice see *Leetch v. Ins. Co.* 2 Daly, 518. As to interpretation of Chinese see *People v. Ah Wee*, 48 Cal. 236.

² *Kuhlman v. Medlinka*, 29 Tex. 385.

³ *Conner v. State*, 25 Ga. 515.

⁴ Whart. Crim. Law, 8th ed. §§ 967-8; *Broom & Hadley's Com.* iv. 364 (Am. ed. ii. 567); *R. v. Charlesworth*, 2 F. & F. 332; *U. S. v. Coolidge*, 2 Gall. 364; *U. S. v. Caton*, 1 Cranch C. C. 150; *People v. Kelly*, 24 N. Y. 74; *Holman v. Austin*, 34 Tex. 668.

⁵ May, Law of Parl. 405; 4 Bl. Com. 284.

⁶ *Scholes v. Hilton*, 10 M. & W. 16; *Chapman v. Davis*, 3 M. & G. 609; *S. C.*, 4 Scott N. R. 319.

vant, especially if he be a public officer whose attendance would be detrimental to other branches of the public service, then the court will refuse the attachment.¹ The question of relevancy is for the court.²

§ 452. The trial court, at any period of the examination, may put questions to the witness for the purpose of eliciting facts bearing on the issue; and a witness may be even recalled for this purpose, or a witness not called by the parties³ may be called and examined by the court.⁴ Nor is the court, as to evidence, bound by the rule excluding leading questions.⁵ But an answer not in itself evidence, brought out by a question from the court, may be ground for reversal.⁶

§ 453. A witness, examined as such in a court of justice, is so far privileged that he is not liable to suit for words spoken by him in answer to questions put by counsel, with the allowance, either express or implied, of the court.⁷ And in England this protection was extended in 1876 to volunteer explanations, which, out of court, would have been libellous.⁸

§ 454. It would unduly swell this volume to enter upon an exposition of the rules adopted by the courts for the examination and cross-examination of witnesses.

¹ *Dicas v. Lawson*, 1 C., M. & R. 934; 7 Dowl. 693. See *supra*, § 350.

² *Tippins v. Coates*, 6 Hare, 16.

³ *State v. Lee*, 80 N. C. 483.

⁴ *R. v. Holden*, 8 C. & P. 609.

⁵ *Whart. on Ev.* § 281; *R. v. Watson*, 6 C. & P. 653; *Middleton v. Barned*, 4 Exch. 243; *Com. v. Galavan*, 9 Allen, 271; *Palmer v. White*, 10 Cush. 321; *Epps v. State*, 19 Ga. 102. The questions, however, must grow out of the facts of the case. *Spinks v. State*, 57 Ala. 42.

⁶ *People v. Lacoste*, 37 N. Y. 192.

“It should also be mentioned that, during the progress of the trial, the judge may question the witnesses, and that, even though the counsel for the prosecution has closed his case, and the counsel for the defendant has

taken an objection to the evidence, the judge may make any further inquiries of the witness that he thinks fit, in order to answer the objection. *R. v. Remnant*, R. & R. 136. Where, after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held that the prisoner's counsel had a right to cross-examine again if he thought it material. *R. v. Watson*, 6 C. & P. 653.” *Archbold's C. P.* 17th ed. (1871) 296.

⁷ *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569; *Kennedy v. Hilliard*, 10 Ir. L. R. N. S. 195.

⁸ *Seaman v. Netherclift*, L. R. 1 C. P. D. 540.

These rules will be found discussed in my work on Evidence in Civil Issues.¹

§ 454 *a*. It has been shown that while, as a rule, leading questions are not permitted, exceptions are recognized where witnesses are unwilling; where they are of weak memory; where a witness is called to contradict; and where such a mode of questioning is logically consistent with a fair and honest development of the case.² There are peculiar reasons why these distinctions should be kept in mind in criminal trials. In such trials, while there are undoubtedly willing witnesses, and while there may be occasionally witnesses so stupid or so corrupt as to be ready at once to adopt any statements suggested in the questions of counsel, the main difficulty in the way of a fair and full development of the facts arises from the

Leading
questions
excluded.

¹ See Whart. on Ev. as follows:—

The court has discretion as to cumulation of witnesses, and examination, § 505.

So as to mode and tone of examination, § 506.

A witness cannot be asked as to conclusion of law, § 507.

The conclusion of a witness as to motives inadmissible, § 508.

The opinion of witness cannot ordinarily be asked, 509.

A witness may give substance of conversation or writing, § 514.

Vague impressions of facts on the part of a witness are inadmissible, § 515.

A witness may refresh his memory by memoranda, § 516. See *Harvey v. State*, 40 Ind. 516; *Chute v. State*, 19 Minn. 271.

Such memoranda are inadmissible if unnecessary, § 517.

Not fatal that the witness has no recollection independent of notes, § 518.

It is not necessary that notes should be independently admissible, § 519.

Memoranda of witness admissible if primary and relevant, § 520.

Notes in such case must be primary, § 521.

It is not necessary that the writing should be by witness, § 522.

It is inadmissible if subsequently concocted, § 523.

Depositions may be used to refresh the memory of the witness, § 524.

The opposing party is not entitled to inspect notes which fail to refresh memory of the witness, § 525.

The opposing party may put the whole notes in evidence if used, § 526.

Cross-examination.

On cross-examination leading questions may be put, § 527.

Closeness of cross-examination is at the discretion of the court, § 528. See also *Davison v. People*, 90 Ill. 222.

A witness can usually be cross-examined only on the subject of his examination in chief, § 529.

His memory may be probed by pertinent written instruments, § 531.

But collateral points cannot be introduced to test memory, § 532.

Archbold's C. P. 17th ed. 296.

² Whart. on Ev. §§ 498 *et seq.*

2 anxiety of conscientious and humane witnesses not to say anything, where life or liberty is at stake, which they are not required to tell. In the nervous tension and physical discomfort, also, so often attendant on criminal trials, even the coolest witness, supposing his testimony, as with the highest order of witnesses is often the case, not to have been previously arranged with the assistance of counsel, may forget at the moment of examination some material incidents; and even when his testimony has been prearranged, his memory at the critical moment may fail. It would be a perversion of justice to hold that in such cases counsel are to be precluded from suggesting to witnesses associations which may bring out the facts still undetailed. We have already noticed how dependent memory is on association;¹ and there are few cases in which association, essential as it is to the grouping of incidents, is so apt to be paralyzed as those in which conscientious and intelligent witnesses, in the heat and confusion of a crowded court-room, with a consciousness that on their testimony depends the fate of a fellow being on the one side, and the due maintenance of public justice on the other side, are called upon, on the solemnity of an oath, to tell what they know about a particular transaction. They have no test which enables them to decide what part of their recollections may be admissible, and what is inadmissible. They know that they cannot tell everything, for even to their minds "everything" includes a great deal that is irrelevant and immaterial. They have to select the material facts, in their own knowledge, bearing on the contested issue; but when they undertake to marshal these facts, their memory falters, and needs to be prompted by the suggestion of the proper associations. Cases of this kind are readily distinguishable from those of the ready and corrupt witness, to prevent the prompting of whom the rule before us was made.²

¹ Supra, §§ 373, 378.

² "It is a general rule, that in a direct examination of a witness he shall not be asked leading questions, or, in other words, questions framed in such a manner as to suggest to the witness the answers required of him. To this rule, however, there are a few

exceptions. To identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked, in direct terms, if that be the person he meant. *R. v. Watson*, 2 Stark. 116; *R. v. De Berenger*, 1 Stark. Ev. 125. Where a witness swears to a certain

§ 455. Another point, falling under this head, occurs so frequently in criminal practice, that it is proper it should be here discussed in detail. A witness, we must here specially notice, is not to be permitted to testify as to a conclusion of law. Sometimes this is so far pressed

Witness cannot be asked as to conclusion of law.

fact, and another witness is called for the purpose of contradicting him, the latter may be asked, in direct terms, whether that fact ever took place. *Courteen v. Touse*, 1 Campb. 43. Again, if the witness appear evidently to be hostile to the party who has called him, the counsel may put leading questions to him, having first obtained permission of the court to do so. *Peake Ev.* 198; 2 *Phil. Ev.* 462; *Clarke v. Saffery*, Ry. & M. 126; and see *Bastin v. Carew*, *Ibid.* 127; *R. v. Chapman*, 8 C. & P. 558; *R. v. Ball*, 8 C. & P. 745. And, lastly, questions which are merely introductory to others that are material are in general allowed to be asked, in direct terms, without objection." *Arch. C. P.* 17th ed. p. 396.

The American authorities are collected in *Whart. on Ev.* §§ 498 *et seq.*

On the psychological questions the following extracts may be of value:—

"Now it is obviously upon this recording of impressions, so that they are reproduced as ideas when the appropriate *suggesting strings* are pulled, that all our accumulated knowledge depends. For when we say that we 'know' a language, or an author, or a department of science, we do not mean that the whole, or even any part of that knowledge, is present to our minds at the time; since, as Sir William Hamilton has justly remarked, 'the infinitely greater part of our spiritual treasures lies always beyond the sphere of our consciousness.' The perfection of our knowledge consists, in fact, in the readiness and precision with which the appropriate words or

ideas *spontaneously* present themselves whenever we *desire* to bring them *within* the sphere of our consciousness; and this action depends upon the strength of the association previously formed between the word or idea actually before the mind at each moment, and that which furnishes the response to it. Thus, in speaking a foreign language with which we are thoroughly conversant, the *automatic* play of suggestion calls up the successive words or phrases that express the equivalents of those in which our thoughts have shaped themselves. In quoting a book with which we are familiar, the sequence of a long passage may be suggested by the mention of its first words, or by the starting of the idea that forms the subject of it. And when the man of science is called upon to 'explain' a fact, his mind goes forth, as it were, in the direction most likely to lead to the recall of similar facts which he has previously learned, and to that of some principle common to them all. On the other hand, we say that we have 'forgotten' a word or an idea, when we are conscious of the fact that we *must* have once known it, but cannot reproduce it at the moment. Thus, as a recent writer has remarked:—

" 'If we have *ever* known a thing, the question whether we can be said to know it at any particular time is simply whether we can *readily reproduce* it from the storehouse of our memory. There are some ideas, which, if we may use so material an illustration, are systematically arranged in cupboards to which we

as to involve the assumption that a witness cannot be asked as to conclusions of fact. The error of this assumption will be seen

have immediate access, so that we generally know exactly where to find what we want; this is the case with the knowledge that we have in constant daily use. And yet to whom has it not occurred to be unable to recollect, on the spur of the moment, a name or a phrase that is generally most familiar to him; just as he often fails to remember where he laid his spectacles, or his pencil-case, only five minutes before? There are other ideas, again, which we know we have got put away *somewhere*, but we cannot find without *looking for them*; as when we meet an acquaintance whom we have not seen for a long time, and recognize his face without being able to recall his name; or when we go to a foreign country, the language of which we have once thoroughly mastered, and find ourselves in the first instance unable either to speak or to understand it.'” Carpenter, *Ment. Phys.* art. 343. Dr. Carpenter, in a subsequent art. (365), notices the point thus before us in connection with the examination of witnesses:—

“But supposing that—the mind being in full possession of its ordinary powers—the desiderated idea does not at once recur suggestively on the direction of the attention to some idea already present to our consciousness: we then apply the same process to other ideas which successively come before us, selecting those which we recognize as most likely to suggest that which we require, and following out one train of thought after another, in the directions which we deem most suitable, until we either succeed in finding the idea of which we are in search, or give up the pursuit as hopeless. Thus a man who is making up his accounts,

and finds that he has expended a sum in a mode which he cannot recollect, sets himself to consider what business he has done, where he has recently been, what shops he may have entered, and so on. Thus the writer well recollects that, when going to register the birth of one of his own children, he found, when approaching the office, that he had entirely forgotten the intended name, which had been decided on after a considerable amount of domestic discussion; and only brought it to his remembrance by ‘trying back’ over the reasons which had determined the one finally selected.” *Ibid.* art. 373.

“According to this feature, we distinguish the memory as *spontaneous* and *intentional*. In spontaneous memory, the object remembered spontaneously occurs to the mind. In intentional memory it is distinctly sought after until it is found. In spontaneous memory, the representative faculty is prominent, and acts according to its own appropriate laws, while the intelligence waits only to give its recognition to what is presented to its attention. In intentional memory, the intelligence is active, being distinctly aware that some object has been previously known, to recall which it summons the energies of the representative power according to its necessary laws. The two kinds of memory may be advantageously considered apart.” Porter, *Human Intellect*, § 278.

Archbishop Whately likens the resistance of the memory to attempts to force it to the stupefaction of a pointer dog who, when he has lost his scent, is whipped in order to make him find it. The only way by which he can again hit upon it is by letting him wander to and fro, engaged by

when we remember that there are few statements of fact that are not conclusions of fact.¹ It is otherwise as to conclusions of law, which, when relating to domestic law, are for the court to draw and not for witnesses.² Among such conclusions of law legal responsibility is one of the most conspicuous. A witness, no matter how skilful, is not to be permitted to testify as to whether or no a party is responsible to the law;³ or whether certain facts constitute in law an agency.⁴ Law, in the sense here used, embraces whatever conclusions belong properly to the court. Thus it is inadmissible for a witness to give conclusions as to documents which it is the province of the court to interpret.⁵

§ 456. Motive, so far as concerns the action of another, is to be inferred from facts. The facts from which the inferences are to be drawn are to be detailed by the witnesses. For the jury the work of inference is to be reserved,⁶ even though the testimony offered relates to the action of a person in a dying condition, incapable of fully expressing himself.⁷ Yet where a party is examined as to his own conduct, he may be asked as to his motive, or condition of mind, his testimony to such motive being based not on inference but on consciousness.⁸

Conclusions of witness as to motives of other persons inadmissible.

§ 457. That a witness's opinion is admissible is a settled rule, though much difficulty exists as to the meaning of the term. What is *opinion*? "Did A. shoot

Opinion of witness cannot ordinarily be asked.

new objects, when suddenly, if due time be given, the lost scent will be perceived. So with the memory. We cannot force ourselves to recall the name we have forgotten by persistently thinking about its object. We can only remember it by disengaging our mind, and striking upon some association by which the missing fact may be recalled.

¹ See supra, §§ 7 *et seq.*

² See Whart. on Ev. § 507.

³ *R. v. Richards*, 1 F. & F. 87; *Joyce v. Ins. Co.* 45 Me. 168; *Peterson v. State*, 47 Ga. 524; *State v. Klinger*, 46 Mo. 224. See supra, §§ 417 *et seq.*

⁴ *Short Mt. Coal Co. v. Hardy*, 114

Mass. 191; *Prov. Tool Co. v. Man. Co.* 120 *Mass.* 85. See *Fairchild v. Bascomb*, 85 *Vt.* 398.

⁵ Whart. on Ev. § 507.

⁶ *Zantzinger v. Weightman*, 2 *Cranch C. C.* 478; *Whitman v. Freeze*, 23 *Me.* 185; *State v. Mairs*, 1 *Coxe*, 453; *Ballard v. Lockwood*, 1 *Daly*, 158; *Shepherd v. Willis*, 19 *Ohio*, 142; *Gilman v. Riopelle*, 18 *Mich.* 145; *State v. Garvey*, 11 *Minn.* 154; *Hudgins v. State*, 2 *Ga.* 173; *Hawkins v. State*, 25 *Ga.* 207; *Peake v. Stout*, 8 *Ala.* 647; *Clement v. Cureton*, 36 *Ala.* 120.

⁷ *Griggs v. State*, 59 *Ga.* 738.

⁸ Supra, § 431; Whart. on Ev. §§ 482, 508; *Dill v. State*, 6 *Tex. Ap.* 113.

B. ? ” C., a by-stander, answers, “ My opinion is that he did : I saw the pistol aimed ; I heard the report ; I saw the flash ; I saw B. fall down, as I supposed, dead ; from all this I infer that A. killed B.” This is all inference on the part of the witness ; yet it is admissible.¹ On the other hand, it has been held inadmissible to ask a witness his opinion as to whether a defendant, who was alleged to have acted in self-defence, was at the time in imminent danger ;² or as to whether a certain physician had acted honorably towards his professional brother ;³ or as to what is a reasonable load for a horse ;⁴ or as to the effect of particular charges in an account ;⁵ or as to the effect of certain acts on the credit of a firm ;⁶ or as to the probable effect of certain acts in saving a burning house ;⁷ or as to the religious sense of a dying declarant ;⁸ or as to the conjectural losses of certain business operations ;⁹ or as to whether the condition of a third person indicates disease.¹⁰ Nor can a witness be asked whether he did not exercise great care in the discharge of a certain duty ;¹¹ as to whether a particular alteration of machinery was technically a repair ;¹² as to whether a certain person acted fairly ;¹³ as to whether a certain person “ looked excited ; ”¹⁴ as to whether a certain person “ looked downcast ; ”¹⁵ as to whether an engine appeared capable of drawing a train ;¹⁶ as to whether a certain bridge was safe ;¹⁷ as to whether certain conduct indicated adultery,¹⁸ or recent sexual intercourse ;¹⁹ as to whether

¹ See *supra*, §§ 7-18.

² *State v. Rhoads*, 29 Oh. St. 171.

³ *Ramadge v. Ryan*, 9 Bing. 333; though see *Greville v. Chapman*, 5 Q. B. 731, a case of doubtful authority.

⁴ *Oakes v. Weston*, 45 Vt. 430.

⁵ *U. S. v. Willard*, 1 Paine, 539.

⁶ *Donnell v. Jones*, 13 Ala. 490; *Thomas v. Isett*, 1 Greene, 470.

⁷ *Gibson v. Hatchett*, 24 Ala. 201.

⁸ *State v. Brunetto*, 13 La. An. 45.

⁹ *Rider v. Ins. Co.* 20 Pick. 259.

¹⁰ *Ashland v. Marlboro*, 99 Mass. 47; though in *Parker v. St. Co.* 109 Mass. 506, it was held that a non-expert could testify as to another's proba-

ble health. See also cases cited to § 459.

¹¹ *Bryant v. Glidden*, 39 Me. 458.

¹² *Bigelow v. Collamore*, 5 Cush. 226.

¹³ *Zantzinger v. Weightman*, 2 Cranch C. C. 478.

¹⁴ *Gassenheimer v. State*, 52 Ala. 314.

¹⁵ *McAdory v. State*, 59 Ala. 92; but see *Culver v. Dwight*, 6 Gray, 44; *State v. Hudson*, 50 Iowa, 157.

¹⁶ *Sisson v. R. R.* 14 Mich. 489.

¹⁷ *Crane v. Northfield*, 33 Vt. 124.

¹⁸ *Cameron v. State*, 14 Ala. 546; *Cox v. Whitfield*, 18 Ala. 738.

¹⁹ *McKnight v. State*, 6 Tex. Ap. 158.

a certain disorderly house was a nuisance ;¹ as to whether a certain house was a bawdy-house ;² as to whether a certain person's conduct would have particular effects ;³ as to whether certain language would have particular effects ;⁴ as to whether certain conduct was negligent, or otherwise ;⁵ as to whether certain conduct was honest ;⁶ as to whether the wind would have certain effects in extending a fire ;⁷ as to whether in a particular case there was danger to life ;⁸ as to whether a gate of a drawbridge should be shut at night ;⁹ as to whether certain injuries could have been avoided.¹⁰

§ 458. The true line of distinction is this : an inference necessarily involving certain facts may be stated without the facts, the inference being an equivalent to a specification of the facts ; but when the facts are not necessarily involved in the inference (*e. g.* when the inference may be sustained upon any one of several distinct phases of fact, none of which it necessarily involves), then the facts must be stated.¹¹ In other words, when the opinion is the mere short-hand rendering of the facts, then the opinion can be given, subject to cross-examination as to the facts on which it is based.¹²

Otherwise when opinion is facts at short-hand.

§ 459. Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of

So as to noises, smells, and identifications.

¹ *Smith v. Com.* 6 B. Monr. 21.

² See on this topic fully, Whart. Crim. Law, 8th ed. § 1451.

³ *Richards v. Richards*, 37 Penn. St. 225.

⁴ *Johnson v. Ballew*, 2 Porter, 29.

⁵ *Crofut v. Ferry Co.* 36 Barb. 201; *Teall v. Barton*, 40 Barb. 137; *Taylor v. Monnot*, 4 Duer, 116; *Livingston v. Cox*, 8 W. & S. 61; *Otis v. Thom*, 23 Ala. 469. See *Penn. R. v. Henderson*, 51 Penn. St. 315.

⁶ *Johnson v. State*, 35 Ala. 370.

⁷ *State v. Watson*, 65 Me. 74.

⁸ *State v. Rhoads*, 29 Oh. St. 171.

⁹ *Nowell v. Wright*, 3 Allen, 166.

¹⁰ *Winters v. R. R.* 39 Mo. 468. See *Patterson v. Colebrook*, 29 N. H. 94.

¹¹ See cases given in Whart. on Ev.

§ 510; and see also *State v. Hopkins*, 50 Vt. 316; *McKnight v. State*, 6 Tex. Ap. 158.

¹² *Taylor v. R. R.* 48 N. H. 304; *Sherman v. Blodgett*, 28 Vt. 149; *Parsons v. Ins. Co.* 16 Gray, 463; *Clearwater v. Brill*, 61 N. Y. 625; *Ardesco v. Gilson*, 63 Penn. St. 146; *Sorg v. Congregation*, 63 Penn. St. 156; *King v. Fitch*, 2 Abb. (N. Y.) App. 508; *Selden v. Bank*, 3 Minn. 166; *Montgomery v. Scott*, 34 Wis. 338; *Lewis v. State*, 49 Ala. 1; *Avary v. Searcy*, 50 Ala. 54; *Ray v. State*, 50 Ala. 104; *Sparr v. Wellman*, 11 Mo. 230; *Sayfarth v. St. Louis*, 52 Mo. 449; *State v. Folwell*, 14 Kans. 110; *State v. Harrington*, 12 Nev. 125. See *Chicago v. Greer*, 9 Wall. 726.

things is such that it cannot be reproduced and made palpable in the concrete to the jury.¹ Eminently is this the case with regard to noises;² and smells;³ to questions of identification, where a witness is allowed to speak as to his opinion or belief,⁴ and to the question whether a party believed himself at the time to be in great danger of death.⁵

§ 460. This is also the case as to matters with which the witness is specially acquainted, but which cannot be specifically described.⁶ Thus a witness has been permitted to

¹ *Com. v. Sturtivant*, 117 Mass. 122; *Safford v. Grout*, 120 Mass. 20; *Com. v. Piper*, 120 Mass. 186; *Kearney v. Farrell*, 28 Conn. 317; *People v. Eastwood*, 14 N. Y. 562; *Townsend v. Brundage*, 6 Thomp. & C. 527; *Dubois v. Baker*, 40 Barb. 556; *Brennan v. People*, 15 Ill. 511; *State v. Langford*, Busbee, 436; *Woodward v. Gates*, 38 Ga. 205; *Patrick v. The Adams*, 19 Mo. 73; *Eyerman v. Sheehan*, 52 Mo. 221; *Albright v. Corley*, 40 Tex. 105; *Underwood v. Waldron*, 33 Mich. 232.

² *State v. Shinborn*, 46 N. H. 497; *Leonard v. Allen*, 11 Cush. 241, where the meaning of tones of voice and gestures was asked. But see *Messner v. People*, 45 N. Y. 1, cited *supra*, § 271. In *Hardenburg v. Cockroft*, 5 Daly, 79, it was said a witness could not be asked as to how far a voice could be heard.

"It has been said," remarks Mr. Starkie, "that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his knowledge of the fact, since judgment must be given *secundum allegata et probata*; and a man cannot be indicted for perjury who falsely swears as to his persuasion or belief. As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is *correct*, as where a man believes a fact to be true merely because he has heard it said to

be so; but, with respect to persuasion or belief as founded on facts within the actual knowledge of the witness, the position is not true. On questions of identity of persons and of handwriting, it is every day's practice for witnesses to swear that they believe the person to be the same, or the handwriting to be that of a particular individual, although they will not swear positively; and the degree of credit to be attached to the evidence is a question for the jury. With regard to the second objection, it has been decided that a man who falsely swears that he thinks or believes may be indicted for perjury." 1 Stark. Ev. 153.

³ *Kearney v. Farrell*, 28 Conn. 317; *Conner v. State*, 6 Tex. Ap. 455. See Max Müller's *Lectures on Language*, vol. ii. Lect. i.

Thus a witness may say that a smell was that of chloroform. *Conner v. State*, 6 Tex. Ap. 455.

⁴ *Fryer v. Gathercole*, 13 Jur. 542; *R. v. Orton*, Pamph. Trial; *State v. Pike*, 49 N. H. 398; *Com. v. Pope*, 103 Mass. 446; *Woodward v. State*, 4 Baxter, 322; *Powell's Evidence* (4th ed.), 102. *Supra*, § 13; *infra*, § 802.

⁵ *Supra*, § 431; *Dill v. State*, 6 Tex. Ap. 110.

⁶ *Kearney v. Farrell*, 28 Conn. 317; *Bennett v. Fail*, 26 Ala. 605; *Cole v. Varner*, 31 Ala. 244; *Innis v. The*

testify that certain parties were attached to each other;¹ expressed that a culvert was "steep right down, a culvert that I in the concrete. thought a dangerous place;"² that an engine was running at an estimated speed;³ that a third person was sick or disabled;⁴ that a particular wagon made certain tracks which were in question;⁵ that a horse appeared unwell or unsound, or was or was not diseased;⁶ that a cow was in good condition;⁷ that certain pictures were good likenesses;⁸ that the witness did all in his power to effect a particular result;⁹ that certain hairs on a

Senator, 4 Cal. 5. See *State v. Stickley*, 41 Iowa, 232.

¹ *Trelawney v. Colman*, 2 Stark. 192; *Robertson v. Stark*, 15 N. H. 114; *McKee v. Nelson*, 4 Cow. 355.

² *Lund v. Tyngsboro*, 9 Cush. 36.

³ *Detroit R. R. v. Van Steinburg*, 17 Mich. 99.

⁴ *State v. Knapp*, 45 N. H. 148; *Whittier v. Franklin*, 46 N. H. 23; *Norton v. Moore*, 3 Head, 480; *Brown v. Lester*, Ga. Dec. part i. 77; *Milton v. Rowland*, 11 Ala. 732; *Autauga Co. v. Davis*, 32 Ala. 703; *Barker v. Coleman*, 35 Ala. 221; *Stone v. Watson*, 37 Ala. 279; *Elliott v. Van Buren*, 33 Mich. 49; *Endicott, J., Com. v. Sturtivant*, 119 Mass. 132.

⁵ *State v. Folwell*, 14 Kans. 105.

⁶ *Willis v. Quimby*, 31 N. H. 485; *Spear v. Richardson*, 34 N. H. 428; *State v. Avery*, 44 N. H. 392; *Johnson v. State*, 37 Ala. 457. See these cases approved in *Pike v. State*, 49 N. H. 426.

⁷ *Joy v. Hopkins*, 5 Denio, 84.

⁸ *Barnes v. Ingalls*, 39 Ala. 193.

⁹ *Brink v. Han. Ins. Co.* N. Y. App. 1880, 9 Rep. 518.

In this case Church, C. J., said:—

"It is urged that it is not competent for a witness to testify to the very conclusion of fact which the jury are to pass upon. But there are questions of this character which the trial judge may allow without committing a legal error. In general,

facts should be stated and inferences left to the jury. But here it might be difficult to draw a correct conclusion from the facts stated, or rather the fact of diligence might be left uncertain from the facts stated. In such a case it is not legal error to allow such a question. Whether a person transacted a specified business as soon as he could, is a fact peculiarly within his own knowledge. A person is to walk a mile as soon as he can. From the fact that it occupied half an hour, a jury would be puzzled to determine whether he did it as soon as he could or not. Besides, the question was not whether the proofs of loss were presented as soon as possible, which was the question for the jury, but whether the witness individually did all he could to have them presented. The question held incompetent in *Carpenter v. Eastern Trans. Co.* 71 N. Y. 580, was quite different. There the question was whether another person, in the opinion of the witness, omitted or neglected any duty in respect to a certain matter. In the case at bar it was sought to prove a fact, not an opinion, within the knowledge of the witness. While it would not have been a legal error to have sustained the objection, I am of opinion, under the circumstances of this case, that it was not legal error to overrule it.

"The object of all examinations in judicial tribunals is to elicit truth;

club appeared to the naked eye human, and to resemble the hair of the deceased ;¹ that a certain substance was "hard pan ;"² that certain distances or weights were to be estimated in a particular way ;³ that certain persons were insane,⁴ or drunk,⁵ or otherwise ; that certain obviously dangerous wounds caused death ;⁶ that a liquor looked like whiskey ;⁷ that a color was of a certain hue ;⁸ that a certain person "acted as if she felt very sad ;"⁹ that a certain person "appeared to be in fear ;"¹⁰ that, on being held to answer, he "looked as if he felt badly ;"¹¹ that the appearance of a blood-stain indicated the spurt came from below, though the witness had never experimented with blood or other fluid in this relation.¹² And, as a general rule, "duration, distance, dimension, velocity, &c., are often to be proved only by the opinion of witnesses, depending as they do upon many minute circumstances which cannot be fully detailed."¹³ And in addition to the rule already given that opinion is admissible when it is fact in short-hand, we may hold that it is not necessary for a witness to be an expert, to enable him to give his opinion as to a matter depending upon special knowledge, when

and there are many cases where the form of questions and the manner of examination must be left to the discretion of the trial judge. No injustice could have been done, because the answer would not be likely to prevail against facts which might be drawn out on cross-examination or proved by other witnesses inconsistent with it."

¹ *Com. v. Dorsey*, 103 Mass. 413.

² *Currier v. R. R.* 34 N. H. 498.

³ *Hackett v. R. R.* 35 N. H. 390; *Eastman v. Amoskeag Co.* 44 N. H. 143; *Fulsome v. Concord*, 46 Vt. 135; *Campbell v. State*, 23 Ala. 44; *Rawles v. James*, 49 Ala. 183.

⁴ See *supra*, § 417; *Gahagan v. R. R.* 1 Allen, 187; *People v. Eastwood*, 14 N. Y. 562; *Stanley v. State*, 26 Ala. 26.

⁵ *Ibid.*; *Aurora v. Hillman*, 90 Ill. 61.

⁶ *State v. Smith*, 22 La. An. 468.

⁷ *Com. v. Dowdican*, 114 Mass. 257.

⁸ *Com. v. Owens*, 114 Mass. 252.

⁹ *Culver v. Dwight*, 6 Gray, 444.

¹⁰ In *Brownell v. People*, 38 Mich. 786, *Campbell, C. J.*, said: "There is no doubt that evidence of the opinions of witnesses, that Brownell (the defendant in a homicide case) appeared to be in fear, should not have been shut out. The case of *People v. Lilly*, 38 Mich. 270, decided since the trial below, covers so much of this case as to make it useless to enlarge on this point and some others."

¹¹ *State v. Hudson*, 50 Iowa, 157; but see *McAdory v. State*, 59 Ala. 92.

¹² *Com. v. Sturtivant*, 117 Mass. 122, where the question is ably discussed by *Endicott, J.*; *Richardson v. State*, 7 Tex. Ap. 487.

¹³ *Kingman, C. J.*, *State v. Folwell*, 14 Kans. 110; citing *Poole v. Richardson*, 3 Mass. 330. See also *Com. v. Malone*, 114 Mass. 295.

he states the facts on which he bases his opinion.¹ It is otherwise as to matters concerning which the jury can themselves form opinions, in which case witnesses cannot state opinions which do not themselves involve the facts from which they are drawn.²

§ 461. It is sufficient, when the spoken words of another are to be testified to, to give their substance; the witness swearing to the material accuracy and completeness of the substance.³ A witness, however, cannot be permitted to say what is the impression left on him by a conversation, unless he swears to such impressions as recollections and not inferences.⁴ But what a witness did in consequence of a conversation he may be allowed to prove.⁵

Witness may give the substance of conversations or writings.

§ 462. The same distinction applies to other objects. The limitedness both of human observation and of human expression forbids the reproduction of any fact exactly; ⁶ it is enough if a witness swears to events and objects according to the best of his recollection and belief.⁷

Vague impressions of facts are inadmissible.

But it is no objection to the admissibility of such evidence that the witness uses the term "impression," if he testifies to what he believes, however distrustful he may be as to perfect accuracy.⁸ It is for the jury to determine how far such "impressions" are

¹ *Currier v. R. R.* 34 N. H. 498; *Richardson v. Hitchcock*, 28 Vt. 149; *O'Neill v. Lowell*, 6 Allen, 110; *Browning v. R. R.* 2 Daly, 117; *Ise-lin v. Peck*, 2 Robt. (N. Y.) 629; *Penn. R. R. v. Henderson*, 51 Penn. St. 315; *Dailey v. Grimes*, 27 Md. 440; *Panton v. Norton*, 18 Ill. 496; *Thomas v. White*, 11 Ind. 182; *Indianapolis v. Huffer*, 30 Ind. 235; *Detroit R. R. v. Van Steinburg*, 17 Mich. 99; *Sowers v. Dukes*, 8 Minn. 23; *Brackett v. Edgerton*, 14 Minn. 174; *Cochran v. Miller*, 13 Iowa, 128; *Barker v. Coleman*, 35 Ala. 221; *Blackman v. Johnson*, 35 Ala. 252; *Alabama R. R. v. Burkett*, 42 Ala. 83; *People v. Sanford*, 43 Cal. 29.

² *Currier v. R. R.* 34 N. H. 498; *Richardson v. Hitchcock*, 28 Vt. 149; *O'Neill v. Lowell*, 6 Allen, 110; *Browning v. R. R.* 2 Daly, 117; *Ise-lin v. Peck*, 2 Robt. (N. Y.) 629; *Penn. R. R. v. Henderson*, 51 Penn. St. 315; *Dailey v. Grimes*, 27 Md. 440; *Panton v. Norton*, 18 Ill. 496; *Thomas v. White*, 11 Ind. 182; *Indianapolis v. Huffer*, 30 Ind. 235; *Detroit R. R. v. Van Steinburg*, 17 Mich. 99; *Sowers v. Dukes*, 8 Minn. 23; *Brackett v. Edgerton*, 14 Minn. 174; *Cochran v. Miller*, 13 Iowa, 128; *Barker v. Coleman*, 35 Ala. 221; *Blackman v. Johnson*, 35 Ala. 252; *Alabama R. R. v. Burkett*, 42 Ala. 83; *People v. Sanford*, 43 Cal. 29.

³ *Cannell v. Ins. Co.* 59 Me. 582; *Morris v. East Haven*, 41 Conn. 252; *Messner v. People*, 45 N. Y. 1; *Ames v. Snider*, 69 Ill. 376; *Bissell v. Wert*, 35 Ind. 54; *Eaton v. Woolly*, 28 Wis. 628; *State v. Thorp*, 72 N. C. 186; *Gavisk v. R. R.* 49 Mo. 274; *Shepherd v. Hamilton Co.* 8 Heisk. 380; *Largan v. R. R.* 40 Cal. 272.

⁴ *U. S. v. White*, 5 Cranch C. C. 457; *U. S. v. Macomb*, 5 McLean, 286; *Brown v. Com.* 73 Penn. St. 321; *Summons v. State*, 5 Oh. St. 325; and other cases cited Whart. on Ev. § 461.

⁵ *Morris v. Stokes*, 21 Ga. 552; *Lockett v. Minns*, 27 Ga. 207; *Bell v. Troy*, 35 Ala. 104; *Crews v. Threadgill*, 35 Ala. 334; *Helm v. Cantrell*, 59 Ill. 528; *Yost v. Devault*, 9 Iowa, 60.

⁶ *Whaley v. State*, 11 Ga. 123.

⁷ *Supra*, § 378.

⁸ *Whart. on Ev.* § 462.

⁹ *Ibid.*

reliable.¹ So a witness is allowed to state why certain facts are impressed on his memory, if such reasons are not for other grounds inadmissible.² Impressions, however, which are conjectural and uncertain, cannot be detailed.³

§ 463. A witness will not be compelled to answer any question the reply to which would supply evidence by which he could be convicted of a criminal offence.⁴ The privilege, as thus stated, extends to inculpatory documents,⁵ and to marital relations; and hence neither husband nor wife is compelled to answer questions involving the other's criminality.⁶ Refusal to answer, however, may be used as a presumption against a witness so refusing.⁷ Should answers as to

¹ *Duvall v. Darby*, 38 Penn. St. 56; *Crowell v. Bank*, 3 Oh. St. 406; *McRae v. Morrison*, 13 Ired. (L.) 46; *Beverly v. Williams*, 4 Dev. & B. (L.) 236.

² *Thomas v. State*, 27 Ga. 287; *Bell v. Troy*, 35 Ala. 104.

³ *Clark v. Bigelow*, 16 Me. 246; *Lewis v. Brown*, 41 Me. 448; *Humphreys v. Parker*, 52 Me. 502; *Tebbetts v. Flanders*, 18 N. H. 284; *Wheeler v. Blandin*, 24 N. H. 168; *State v. Flanders*, 38 N. H. 324; *Ives v. Hamlin*, 5 Cush. 534; *Wiggins v. Holly*, 11 Ind. 2; *Wells v. Shipp*, 1 Walk. Miss. 383.

⁴ 1 Stark. Ev. 165, 166; Phil. & Am. on Ev. 913, 914; 1 Phil. Ev. 277; Cowen & Hill's note, 516, to 1 Phil. Evid. 267, and cases therein cited; *Paxton v. Douglass*, 19 Ves. 225; *Macbride v. Macbride*, 4 Esp. 242; *R. v. Lewis*, 4 Esp. 225; *R. v. Friend*, 13 How. St. Tr. 16; *R. v. Macclesfield*, 16 How. St. Tr. 1146; *Cates v. Hardacre*, 3 Taunt. 424; *R. v. Slaney*, 5 C. & P. 213; *R. v. Pegler*, 5 C. & P. 521; *Maloney v. Bartley*, 3 Camp. 210; *Chestler v. Wortley*, 7 C. B. 410; 1 Burr's Trial, 244; *Neale v. Cuninghame*, 1 Cranch C. C. 76; *U. S. v. Moses*, 1 Cranch C. C. 170; *U. S. v. Strother*, 3

Cranch C. C. 432; *Low v. Mitchell*, 18 Me. 372; *State v. Blake*, 25 Me. 350; *State v. K.* 4 N. H. 562; *Coburn v. Odell*, 30 N. H. 540; *Chamberlain v. Wilson*, 12 Vt. 491; *Brown v. Brown*, 5 Mass. 320; *Com. v. Kimball*, 24 Pick. 366. See *Phelin v. Kenderdine*, 20 Penn. St. 354; *People v. Mather*, 4 Wend. 229; *People v. Rector*, 19 Wend. 569; *Southard v. Rexford*, 6 Cow. 254; *Tappan, in re*, 9 How. Pr. 394; *Byass v. Sullivan*, 21 How. Pr. 50; *Warner v. Lucas*, 10 Ohio, 336; *Howel v. Com.* 5 Grat. 664; *Poindexter v. Davis*, 6 Grat. 481; *Lister v. Boker*, 6 Blackf. 439; *Printz v. Cheney*, 11 Iowa, 469; *Hopkins v. Olin*, 23 Wis. 309; *Simmons v. Holster*, 13 Minn. 249; *State v. Edwards*, 2 N. & McC. 13; *Higdon v. Heard*, 14 Ga. 255; *Pleasant v. State*, 15 Ark. 624; *State v. Marshall*, 36 Mo. 400; *Lea v. Henderson*, 1 Cold. 146. In New York, by the Revised Code, the protection is limited to cases of felony. Rev. Code, § 1854.

⁵ See Whart. on Ev. § 751. *Byass v. Sullivan*, 21 How. (N. Y.) Pr. 50.

⁶ *Cartwright v. Green*, 8 Ves. 405; *R. v. All Saints*, 6 M. & S. 200. See *supra*, § 402.

⁷ *Andrews v. Frye*, 104 Mass. 234. *Infra*, § 478.

guilt be extorted, these answers, as will hereafter be seen, cannot be used against the party thus compelled to answer.¹

§ 464. Although, as we will presently see, exposure to civil liability is no ground for excuse, a witness will be relieved from giving to a question a reply which might expose him to a forfeiture of his estate.² Nor does it make a difference that the penalties, in a penal prosecution, are limited to a fine.³ Thus a party will be protected from giving an answer which exposes him to a prosecution for usury.⁴

Nor to expose himself to a fine or to forfeiture.

§ 465. The privilege just stated cannot be interposed by a party to the issue. It must be claimed by the witness in order to be available.⁵ The judge is

Privilege must be claimed by witness.

¹ *Infra*, § 665.

² *Parkhurst v. Lowten*, 1 Mer. 401; *Uxbridge v. Staveland*, 1 Ves. Sr. 56.

³ *Anderson v. State*, 7 Ohio (Part ii.), 250. But see *infra*, § 468.

⁴ *Bank of Salina v. Henry*, 2 Denio, 155; *Curtis v. Knox*, 2 Denio, 341; *Henry v. Bank*, 3 Denio, 593. See *Parkhurst v. Lowten*, 1 Mer. 401; and see *infra*, § 467.

⁵ *R. v. Adey*, 1 M. & Rob. 94; *Thomas v. Newton*, M. & M. 48, n.; *Fisher v. Ronalds*, 12 C. B. 764; *Mars-ton v. Downes*, 1 A. & E. 34; *State v. Wentworth*, 65 Me. 234; *State v. Foster*, 3 Foster (N. H.), 348; *Com. v. Shaw*, 4 Cush. 594; *Ward v. People*, 6 Hill (N. Y.), 144; *State v. Bilansky*, '3 Minn. 246; *State v. Patterson*, 2 Ired. L. 346; *Newcomb v. State*, 37 Miss. 383; *White v. State*, 52 Miss. 216; *Sodusky v. McGee*, 5 J. J. Marsh. 621; *Clark v. Reese*, 35 Cal. 89. That witness may waive his privilege see *People v. Arnold*, 40 Mich. 710.

As to privilege of party see *supra*, § 432.

"In *R. v. Garbett*, 1 Den. 236, it was held that a witness is not compellable to answer a question if the court be of opinion that the answer might tend to criminate him. It was

also held in the same case, that the court may compel a witness to answer any such question; but that if the answer be subsequently used against the witness in a criminal proceeding and a conviction obtained, judgment will be respited and the conviction reversed." See *infra*, § 470. In a later case, *Fisher v. Ronalds*, 12 C. B. 762, Maule, J., and Jervis, C. J., held, that it is for the witness to exercise his own judgment, and to say whether the answer will criminate him, and that if he thinks that it will, he may refuse to answer. This view was doubted by Parke, B., in a later case (*Osborne v. London Dock Co.* 10 Ex. 698), where the learned judge indicated his adhesion to the doctrine of *R. v. Garbett*. The Court of Queen's Bench, however, has since held that a witness can only claim the right of refusing to answer a question when the court is satisfied that there is any real danger of a prosecution if he does answer. *R. v. Boyes*, 1 B. & S. 311." *Powell's Evidence*, 4th ed. 109.

"It is settled that it is no ground for a witness to refuse to go into the box, that the question will criminate him and that he will refuse to answer it. The privilege can be claimed only

not bound to notify the witness of his privilege in this relation,¹ though he may, at his discretion, give an intimation to this effect.²

§ 466. We have several rulings to the effect that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offence can be furthered.³ This proposition, however, cannot be

Danger of
prosecu-
tion must
be real.

by the witness himself, after he has been sworn and the objectionable question put to him. *Boyle v. Wiseman*, 10 Ex. 647. And the witness must pledge his oath that he believes the answer will tend to criminate him." Powell's Ev. 4th ed. 109.

¹ *Atty. Gen. v. Radloff*, 10 Exch. 88.

² *Fisher v. Ronalds*, 12 C. B. 764; *R. v. Boyes*, 2 Fost. & F. 158; *Foster v. Pierce*, 11 Cush. 437; *Com. v. Price*, 10 Gray, 472; *Mayo v. Mayo*, 119 Mass. 292.

³ *Cates v. Hardacre*, 3 Taunt. 424; *Macullum v. Turton*, 2 Y. & J. 183; *Harrison v. Southcote*, 1 Atk. 518; *King v. King*, 2 Roberts. 153; *Parkhurst v. Lowten*, 2 Swanst. 215; *People v. Mather*, 4 Wend. 229; *Southard v. Rexford*, 6 Cow. 254; *Bank of Salina v. Henry*, 2 Denio, 155; *Lea v. Henderson*, 1 Cold. 146.

The question arose on Burr's trial (1 Burr's Trial, 424) in the following shape: A paper being produced to the court in cipher, a witness (Mr. Willie) was asked, "Did you copy this paper?" He objected that, if any paper he had written would have any effect on any other person, it would as much affect himself. Mr. Wirt insisted that, as the witness had sworn, in a previous deposition, that he did not understand the cipher, the mere *act of copying* could not implicate him. Willie was then asked, "Do you understand its contents?" It was admitted by the witness that the question

per se might be innocent, but should he answer, the prosecution might go on gradually, until it at last obtained matter enough to criminate him. The counsel for the prosecution admitted that, if they had followed with a question as to what were the contents of the letter, the objection might be valid. But they as yet had not. If he answered that he did understand the letter, his answer to the other question might amount to self-crimination; but if he did not understand it, it could not criminate him. The question was again changed, "Do you know this letter to be written by Aaron Burr, or any one under his authority?" Marshall, C. J., said that was a proper question. The witness still refused to answer, as it might criminate him. The question was then argued, when the chief justice remarked, that the proposition contended for on the part of the witness, that he was to be the sole judge of the effect of his answer, was too broad; while that on the other side, that a witness can never refuse unless the answer will *per se* convict him of a crime, was too narrow. He is not compellable to disclose a single link in the chain of proof against him. If the letter contained evidence of a treason, a question determinable on other testimony by his acquaintance with it when written, he might probably be guilty of misprision of treason; and the court ought not to compel his answer. If it relate to the

maintained to its full extent, since there is no answer which a witness could give which might not become part of a supposable concatenation of incidents from which criminality of some kind might be inferred. To protect the witness from answering, it must appear from the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution. The question is for the discretion of the judge, and in exercising this discretion he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. But in any view the danger to be apprehended must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency.¹

Danger of prosecution in a foreign court may be considered as giving this privilege.²

§ 467. A witness cannot excuse himself on the ground that his answer would expose him to civil liability.³

Exposure to civil liability no excuse.

§ 468. The privilege cannot be claimed when the question touches acts to which, from their slight and remote culpability, public prosecutions are not directed, especially when the answer is one which public policy requires to be made. This is peculiarly the case with

Nor mere police liability, or liability as vendee of liquor.

prosecutions under the liquor laws. Thus, a witness will be compelled to answer whether or not he purchased liquor of a man charged with selling it by small measures; nor can he shelter himself from the question by the position that, by buying the liquor, he became an accessory to the misdemeanor of selling it, and thereby a principal.⁴ The question in such cases is, would

misdemeanor (setting on foot an unlawful military expedition against Mexico), the court were not apprised that such knowledge would affect the witness. The conclusion was, that the question which respected the present knowledge of the cipher, as it would not affect him in any view, must be answered.

20 Oh. St. 460, and cases cited supra, § 465.

² U. S. v. McRea, L. R. 3 Ch. App. 79, by Ld. Chelmsford; though see King of Two Sicilies v. Willcox, 1 Sim. N. S. 301.

³ See cases in Whart. on Ev. § 537. See supra, § 464.

⁴ Com. v. Willard, 22 Pick. 476; State v. Rand, 51 N. H. 361; Com. v. Downing, 4 Gray, 29; State v. Wright, 4 Jones (N. C.), 308; though see Do-

¹ R. v. Boyes, 1 B. & S. 311; 9 Cox C. C. 32; 2 F. & F. 157; People v. Kelly, 24 N. Y. 74; Wroe v. State,

the witness's answer that he purchased liquor or other contraband article expose him to a prosecution? If not, he may be compelled to answer when the question is material.¹

§ 469. The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer.² Thus a witness may be compelled to answer as to conditions which he shares with many others (*e. g.* whether he was in the neighborhood of a homicide on a particular day, when such neighborhood includes a city), though not as to conditions which would bring the crime in suspicious nearness to himself.³ But in order to

ran's case, 2 Pars. 467, and *State v. Bonner*, 2 Head, 135, under statutes. Whart. Crim. Law, 8th ed. § 1829.

¹ As to the characteristics of police offences see Whart. Crim. Law, 8th ed. § 23 *a*.

² *Osborn v. Dock Co.* 10 Exch. 698; *Sidebottom v. Adkins*, 27 L. J. Ch. 152; *R. v. Boyes*, 1 B. & S. 311; *Fernandez, ex parte*, 10 C. B. (N. S.) 3, 89; *Com. v. Brainerd*, Thach. C. C. 146; *Grannis v. Branden*, 5 Day, 260; *Jackson v. Humphrey*, 1 Johns. 498; *People v. Mather*, 4 Wend. 229; *Southard v. Rexford*, 6 Cow. 254; *Real v. People*, 42 N. Y. 270; *Galbreath v. Eichelberger*, 3 Yeates, 515; *Vaughan v. Perrine*, 2 Penn. (N. J.) 144; *Winder v. Diffenderffer*, 2 Bland, 166; *Ward v. State*, 2 Mo. 98; *Territory v. Nugent*, 1 Mart. 114; *Richman v. State*, 2 Greene (Iowa), 532; *Kirshner v. State*, 9 Wis. 140; *Floyd v. State*, 7 Tex. 215. See, however, *State v. Edwards*, 2 Nott & McC. 18; Archbold's C. P. (ed. of 1871), 277.

³ *R. v. Boyes*, 1 B. & S. 311; 9 Cox C. C. 22; *Wroe v. State*, 20 Oh. St. 460. *Supra*, § 466.

The English cases on this point are thus recapitulated in Roscoe on Cr. Ev. 8th ed. 148:—

“In *Fisher v. Ronalds*, 12 C. B.

765; 74 E. C. L. R., it was necessary to decide the point, but Maule, J., said, ‘It is for the witness to exercise his discretion, not the judge. The witness might be asked, “Were you in London on such a day?” and though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission would complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him.’ It was equally unnecessary to decide the point in *Osborne v. The London Dock Company*, 10 Ex. R. 701, but the question was a good deal discussed, the opinion of Parke, B., clearly inclining to the view that the witness ought to satisfy the court that the effect of the question will be to endanger him. The learned baron states that this was the opinion of the majority of the judges who considered the case of *R. v. Garbett*, 1 Den. C. C. 236, though they expressly refrained from deciding the point; and he also cites the opinion of Lord Truro, who, in the case of *Short v.*

claim the protection of the court the witness is not required to disclose all the facts, as this would defeat the object for which he claims protection.¹ It is not, indeed, enough for the witness to say that the answer will criminate him.² It must appear to the court, from all the circumstances, that there is a real danger; though this the judge, as we have seen, is allowed to gather from the whole case, as well as from his general conception of the relations of the witness.³ Upon the facts thus developed it is the province of the court to determine whether a direct answer to a question may criminate.⁴

Mercier, 3 Mac. & Y. 205, said, 'A defendant, in order to entitle himself to protection, is not bound to show to what extent the discovery sought might affect him, for to do that he might oftentimes of necessity deprive himself of the benefit he is seeking; but it will satisfy the rule if he states circumstances consistent on the face of them with the existence of the peril alleged, and which also render it extremely probable.' In *Sidebottom v. Adkins*, 3 Jur. N. S. 681; 27 L. J. Ch. 152, Stuart, V. C., compelled a witness to answer questions, although he swore that he should thereby subject himself to a criminal prosecution. In *Adams v. Lloyd*, 3 Hurlst. & Nor. 351, Pollock, C. B., admits the right of the judge to use his discretion, but seems to think that he ought to be satisfied by the oath of the witness, if there are no circumstances in the case which lead him to doubt the real necessity for protection. In the last case on the subject, *R. v. Boyes*, supra, the Court of Queen's Bench, after consideration, held that 'to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger

to the witness from his being compelled to answer.'

"It will thus be seen that in all cases where the point has directly arisen, it has been held that the bare oath of the witness, that he is endangered by being compelled to answer, is not to be considered as necessarily sufficient; but that the judge is to use his discretion whether he will grant the privilege or not. Of course the witness must always pledge his oath that he will incur risk, and there are innumerable cases in which a judge would be properly satisfied with this without further inquiry, but, if he is not satisfied, he is not precluded from further investigation."

¹ *R. v. Garbett*, 2 C. & K. 495; *Fisher v. Ronalds*, 12 C. B. 762; *Mexican & S. Amer. Co. ex parte*, 4 De Gex & J. 220; 27 Beav. 474.

² *R. v. Boyes*, 9 Cox, 32; 1 B. & S. 311; *Osborn v. Dock Co.* 10 Exch. 701; *Fernandez, ex parte*, 10 C. B. N. S. 8. See, however, *contra*, *Warner v. Lucas*, 10 Ohio, 336; *Poole v. Perritt*, 1 Speers, 128.

³ See *Vaillant v. Dodemead*, 2 Atk. 524; *R. v. Boyes*, 1 B. & S. 311.

⁴ *Grannis v. Branden*, 5 Day, 260; *Jackson v. Humphrey*, 1 Johns. 498; *People v. Mather*, 4 Wend. 229; *Southard v. Rexford*, 6 Cow. 254; *Real v. People*, 42 N. Y. 270; *Vaughn*

§ 470. A witness who voluntarily and intentionally opens an account of a transaction exposing him to a criminal prosecution is ordinarily obliged to complete the narrative. He cannot, for instance, state a fact, and afterwards refuse to give the details.¹ Even a party who becomes a witness cannot, after waiving his rights, decline a cross-examination, on the ground that it exposes a criminality which he has already discovered.² But there is high authority to hold that a witness may at any time avail himself of the protection of the court and refuse further answers, unless he has previously waived his privilege by a partial answer.³

v. Perrine, 2 Penn. (N. J.) 534; *Galbraith v. Eichelberger*, 3 Yeates, 515.

“To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger is once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency. *R. v. Boyes*, 1 B. & S. 311; 9 Cox C. C. 32; 2 F. & F. 157. The witness may claim the protection of the court at any stage of the inquiry, although he may already have answered without objection some questions tending to criminate him. *R. v. Garbett*, 2 C. & K. 474. The witness himself is not the sole judge whether his evidence will bring him into danger; the judge must see, from the circumstances of the case and the nature of the evidence,

whether there really is reasonable ground to apprehend danger to him from his being compelled to answer. *Osborn v. London Dock Co.* 10 Exch. 698; 24 L. T. Exch. 140; *Sidebottom v. Adkins*, 27 L. T. Ch. 152; *R. v. Boyes*, 1 B. & S. 311; 30 L. T. Q. B. 301; *Ex parte Fernandez*, 10 C. B. (N. S.) 3, 39, 40; 30 L. T. (C. P.) 321.” *Archbold's C. P.* (ed. of 1871) 277. See *Wroe v. State*, 20 Oh. St. 460.

¹ *Supra*, § 443; *East v. Chapman*, 1 M. & M. 46; 2 C. & P. 573; *Low v. Mitchell*, 18 Me. 372; *State v. K.* 4 N. H. 562; *State v. Foster*, 23 N. H. 348; *Com. v. Knapp*, 10 Pick. 178; *Com. v. Price*, 10 Gray, 472; *Com. v. Howe*, 13 Gray, 26; *Com. v. Pratt*, 126 Mass. 462; *Norfolk v. Gaylord*, 28 Conn. 309; *People v. Carroll*, 3 Park. C. R. 73; *People v. Lohman*, 2 Barb. 216; *Alderman v. People*, 4 Mich. 414. As to accomplices see *supra*, § 444.

² *State v. Ober*, 52 N. H. 459; *Com. v. Lannan*, 13 Allen, 563; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Morgan*, 107 Mass. 199; *McGarry v. People*, 2 Lansing, 227; *Burdick v. People*, 58 Barb. 51; *Fralich v. People*, 65 Barb. 48; *Connors v. People*, 50 N. Y. 240; *Barber v. State*, 13 Fla. 675; *Whart. on Ev.* § 483.

³ *R. v. Garbett*, 2 C. & K. 274; S.

§ 471. If there be a pardon issued by the proper authorities, so as to relieve the witness from any penal responsibility for the offence as to which he is asked, he will be compelled to answer;¹ and so when the statute of limitations has interposed a bar.² Statutes of indemnity and special amnesty have the same effect, when they do not conflict with local constitutions.³ Where a constitution simply secures the witness from being a "witness against himself," indemnity statutes have been held to preclude the witness from setting up privilege;⁴ and the same ruling has been made under a similar provision in the Constitution of the United States.⁵ In Massachusetts, however, where the Constitution provides that no person "shall be compelled to accuse or furnish evidence against himself," a statute which is not coextensive with the constitutional provision does not divest the witness of his common law rights.⁶

Pardon and indemnity do away with protection.

§ 472. We must again notice the important distinction between questions in chief whose object is to bring out facts important to the maintenance of public justice, and questions in cross-examination whose object is merely to harass a witness. A crime has been committed, for instance, and a person who may have been lurking in the neighborhood on an immoral purpose in

To discredit witness, answers will not be compelled to questions imputing disgrace.

C., 1 Den. C. C. 235; 2 Cox C. C. 448; overruling *Dixon v. Vale*, 1 C. & P. 278; *East v. Chapman*, 2 C. & P. 572; *Ewing v. Osbaldiston*, 6 Sim. 808. As according with *R. v. Garbett* may be cited *Cozzens, ex parte*, Buck. 531. See *supra*, § 465.

¹ *R. v. Boyes*, 2 F. & F. 157; S. C., 9 Cox C. C. 32; 1 B. & S. 311; *R. v. Maloney*, 9 Cox C. C. 26; *R. v. Charlesworth*, 2 F. & F. 326.

² *Roberts v. Allott*, 1 M. & M. 192; *Parkhurst v. Lowten*, 1 Mer. 400; *Williams v. Farrington*, 2 Cox Ch. R. 202; *Davis v. Reid*, 5 Sim. 443; *People v. Mather*, 4 Wend. 229; *Close v. Olney*, 1 Denio, 319; *Moloney v. Dows*, 2 Hilt. (N. Y.) 247; *U. S. v. Smith*, 4 Day, 121; *Weldon v. Burch*, 12 Ill. 374; *Floyd v. State*, 7 Tex.

215. As to the constituents of a pardon see *Whart. Cr. Pl. & Pr.* § 520.

³ See *R. v. Strachan*, 7 Cox, 65; *R. v. Skeen*, 8 Cox, 143; *R. v. Buttle*, 11 Cox, 566; *Fernandez, ex parte*, 10 C. B. N. S. 8; *R. v. Hulme*, L. R. 5 Q. B. 377; *People v. Kelley*, 24 N. Y. 74; *Wilkins v. Malone*, 14 Ind. 153; *Frazee v. State*, 58 Ind. 8; *Douglass v. Wood*, 1 Swan, 393; *State v. Quarles*, 13 Ark. 307. See *State v. Henderson*, 47 Ind. 127; *Clark v. Reese*, 35 Cal. 89.

⁴ *State v. Rowell*, 58 N. H. 314; *People v. Kelley (Hackley, in re)*, 24 N. Y. 74.

⁵ *U. S. v. Brown*, 1 Sawyer, 531.

⁶ *Emery's case*, 107 Mass. 172. See *Whart. on Ev.* § 547. *Infra*, § 479.

no way connected with that crime, is called as a witness. He is asked where he was at the period in question; and he declines to answer on the ground that his answer would expose him, not, indeed, to prosecution, but to disgrace, as where the effect would be to show his presence at the time in a house of bad character. He could not be excused from answering on this ground, but he would be excused from answering this or similar questions, when collateral to the issue, put to him on cross-examination for the mere purpose of wounding his feelings, or bringing him into disgrace.¹ And the reason is that every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers; and aside from this general sanction, if witnesses were to be compelled to answer fishing questions as to any scandals in their past lives, the witness-box would become itself a scandal which no civilized community would tolerate. Allow unqualified liberty in this respect, and no witness, no matter how respectable, could be sworn, without being required, if it should please the opposing party, to have even the most remote passages of his past life explored, and without being himself compelled to narrate any events in that life which were discreditable; no matter for how long a time such discredit had been atoned for by penitence, by reformation, and by correction of the wrong. Such inquisitions, however, the courts have refused to permit; and it has hence been held, not only, as we shall see, that parties are bound by collateral answers they wring from a witness as to his history; but that the witness will not be compelled to answer such questions when they are introduced only in order to discredit him, and are not essential to the merits of the case of the party asking them.²

¹ See cases *infra*, § 475.

² *R. v. Hodgson*, R. & R. 211; *Dodd v. Norris*, 4 Camp. 519; *Friend's case*, 4 St. Tr. 225; *Lewis's case*, 4 Esp. 225; *McBride v. McBride*, 4 Esp. 242; *U. S. v. Dickinson*, 2 McLean, 325; *State v. Staples*, 47 N. H. 113; *Smith v. Castles*, 1 Gray, 108; *People v. Herrick*, 13 Johns. 82; *Lohman v. People*, 1 Comst. 379; *S. C.*, 2 Barb. 217; *Lewis, in re*, 39 How. (N. Y.)

Pr. 155; *State v. Bailey*, 1 Penn. (N. J.) 304; *Vaughn v. Perrine*, 2 Penn. (N. J.) 534; *Resp. v. Gibbs*, 3 Yeates, 429; *Galbreath v. Eichelberger*, 3 Yeates, 515; *Houser v. Com.* 51 Penn. St. 332; *Howel v. Com.* 5 Grat. 664; *Forney v. Ferrell*, 4 W. Va. 729; *Leach v. People*, 53 Ill. 311; *Toledo R. R. v. Williams*, 77 Ill. 354; *State v. Garrett*, *Busbee*, 357; *Campbell v. State*, 23 Ala. 44; *Marx v. Bell*, 48

§ 473. But even on cross-examination, a witness cannot ward off answering a question material to the issue on the ground that it imputes disgrace to himself, if such disgrace does not amount to crimination.¹ Thus in a prosecution for bastardy, a witness, introduced by the defendant to prove that the prosecutrix had sexual intercourse with another man about the time of begetting of the child, has been compelled to answer whether he had such intercourse with her, she having denied that she had such intercourse with any one but the defendant.² So in an action for enticing away the plaintiff's wife, where the answer was that the wife was driven from home by her husband's immorality, it was held that the plaintiff, when examined as a witness, could be compelled to answer as to such immorality.³ And though there is a preponderance of authority to the effect that a prosecutrix in rape cannot be compelled to answer whether she has had sexual relations with others than the defendant, on the ground of the immateriality of the question, yet it is generally agreed that she will be compelled to answer as to prior sexual relations with the defendant, the point being material to the issue of consent.⁴

Witness may be compelled to answer questions imputing disgrace when such questions are material to the issue.

Ala. 497; *Harper v. R. R.* 47 Mo. 567.

¹ See *Am. Law Rev.* Jan. 1877, 396. *R. v. Boyes*, 9 Cox C. C. 32; *Com. v. Curtis*, 97 Mass. 574; *Burnett v. Phallon*, 11 Abb. (N. Y.) Pr. 157; *Hunt v. McCalla*, 20 Iowa, 20; *Ragland v. Wickware*, 4 J. J. Marsh. 530; *Rowe, ex parte*, 7 Cal. 184; *Clark v. Reese*, 35 Cal. 89; *Ward v. State*, 2 Mo. 98; *Clementine v. State*, 14 Mo. 112. In *Candell v. Pratt*, 1 M. & M. 108, the witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a particular individual; Best, C. J., interfered to prohibit the question; it was urged by Spankie, Sergeant, that he had a right to put questions tending to degrade a witness, for the purpose of trying his character. Best,

C. J.: "I do not forbid the question on that ground; I, for one, will never go that length. Until I am told by the House of Lords I am wrong, the rule I shall always act upon is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer. This question may subject her to punishment; I think, therefore, it ought not to be put."

² *Hill v. State*, 4 Ind. 112.

³ *Taylor v. Jennings*, 7 Rob. (N. Y.) 581. But see *Dodd v. Norris*, 4 Camp. 419.

⁴ See *Whart. Crim. Law*, 8th ed. § 568, for authorities.

§ 474. In a leading case,¹ Lord Ellenborough, C. J., compelled a witness to answer whether he had not been confined for theft in jail; and, on the witness's appealing to the court, said, "If you do not answer I will send you there." In this country there has been some hesitation in permitting a question the answer to which not merely imputes disgrace, but touches on matters of record;² but the tendency now is, if the question be given for the purpose of honestly discrediting a witness, to require an answer.³

Witness
may be
asked
whether
he has
been in
prison.

¹ *Frost v. Holloway*, 1 Stark. on Ev. 197.

² See *Griswold v. Newcomb*, 24 N. Y. 298; *Real*, in re, 55 Barb. 186. *Supra*, § 153. See, to effect that witness is not compelled to answer, *People v. Abbott*, 19 Wend. 192; *Lohman v. People*, 1 Comst. 379; S. C., 2 Barb. 216; *People v. Blakeley*, 4 Parker C. R. 177; *Johnson v. State*, 48 Ga. 116.

³ *Com. v. Bonner*, 97 Mass. 587; *Real v. People*, 42 N. Y. 270; *Howser v. Com.* 51 Penn. St. 832; *State v. March*, 1 Jones (N. C.), 526; *State v. Garrett*, *Busbee*, 357; *Wilbur v. Flood*, 16 Mich. 40; *People v. Manning*, 48 Cal. 335; *People v. Chin*, 51 Cal. 597 (by statute).

In *Real v. People*, 42 N. Y. 270, it was said by Grover, J.: "My conclusion is, that a witness upon cross-examination may be asked whether he has been in jail, the penitentiary, or state prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places. When the inquiry is confined as to whether he has been convicted, and of what, a different rule may perhaps apply. This involves questions as to the jurisdiction and proceedings of a court of which the witness may not be competent to speak. This was the point involved in *Griswold v. Newcomb*, 24 N. Y. 298, and the only point in that case. Here

the inquiry was simply whether and how long the witness had been in the penitentiary. This the witness knew and could not be mistaken about. . . . The extent of the cross-examination of this character is somewhat in the discretion of the court, and must necessarily be so to prevent abuse." In *State v. Pike*, 65 Me. 111, it was held that a witness, having testified on cross-examination that he had been in prison, could be asked what this was for. Ordinarily convictions must be proved by record. *Clement v. Brooks*, 13 N. H. 92; *Com. v. Quin*, 5 Gray, 478; *Newcomb v. Griswold*, 24 N. Y. 298; *Stout v. Russell*, 2 Yeates, 334; *People v. Reinhardt*, 39 Cal. 449. *Supra*, § 153.

In *State v. Huff*, 11 Nev. 19, it was held that a witness could only be asked as to convictions that affect credit, and not as to one for assault and battery. And see, to same general effect, *Brown v. People*, 15 N. Y. Sup. Ct. 562.

That a witness may explain under oath the circumstances of a conviction in another State, put in evidence to affect his credit, see *infra*, §§ 489, 596 *a*.

"Everybody recollects the famous question on the trial of Orton, which has generally been held unjustifiable, mainly on the ground that the relations between the sexes have no direct bearing on the probability of the wit-

§ 475. It is held in Massachusetts, that the rule precluding questions to a witness as to his religious belief is unaffected by the statute removing disability on account of religious disbelief, but permitting evidence of such disbelief in order to affect credibility.¹ In New York a different conclusion is reached, under the Constitution of 1848, which permits atheists to testify.² That such questions cannot be put to affect competency we have already seen.³

Witness may be cross-examined as to his religious belief.

§ 476. A witness will ordinarily be compelled to answer any questions which would probe the accuracy of his memory.⁴ Answers, also, may be compelled to any questions as to the witness's corrupt or interested leanings in the case,⁵ or as to his means of information;⁶ and to matters connected with the *res gestae* a witness may be compelled to answer questions, no matter how much charged with disgrace.⁷ And while courts have refused to permit a witness to be examined as to past irrelevant misconduct, yet questions have been permitted tending to search his conscience for such recent infamy as leaves his testimony entitled to little respect.⁸ The same rule applies to questions probing veracity.⁹ But if a criminal conviction is put in evidence to discredit a

And so of questions as to motive or veracity or to the *res gestae*.

ness telling the truth." Lond. Law J. 1876, cited Whart. on Ev. § 542.

Sir James Stephen, in his Digest of the Law of Evidence, expounds the law as follows: "When a witness is cross-examined he may be asked any questions which tend (1.) to test his accuracy, veracity, or credibility; or (2.) to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided for in article 120, namely, when the answer might expose him to a criminal charge or penalty."

¹ Com. v. Burke, 16 Gray, 33.

² Stanbro v. Hopkins, 28 Barb. 265.

³ Whart. on Ev. § 396. Supra, § 362.

⁴ Supra, § 376; Kelsey v. Ins. Co.

35 Conn. 225; People v. Morrigan, 29 Mich. 5; McFarlin v. State, 41 Tex. 23; and see infra, § 485.

⁵ State v. Dee, 14 Minn. 35; Scott v. State, 64 Ind. 400. This has been pushed to a great extent by Best, J., in Cundell v. Pratt, M. & M. 108; and by Lord Tenterden, in Roberts v. Allatt, M. & M. 192. See infra, § 477.

⁶ Pannell v. Com. 86 Penn. St. 260.

⁷ Supra, § 472; infra, § 485; Cundell v. Pratt, 1 M. & M. 108; U. S. v. White, 5 Cranch C. C. 38; People v. Mather, 4 Wend. 250-4; Bernev v. Mitnacht, 2 Sweeny, 582; Hill v. State, 4 Ind. 112; Foster v. People, 18 Mich. 266.

⁸ Cundell v. Pratt, M. & M. 108; Roberts v. Allatt, M. & M. 192; Real v. People, 42 N. Y. 270.

⁹ Ordway v. Haynes, 50 N. H. 159; Boles v. State, 46 Ala. 204.

witness, he may be asked as to the collateral incidents of such conviction.¹

§ 477. A witness may also be compelled to answer questions concerning his relationship to the prosecution or the defence, his interest in the suit, his capacity of discernment and expression, his motives, and his prejudices. He may be thus required to explain whatever would show bias on his part or incapacity to testify accurately.² He may be asked, for instance, whether he did not belong to a secret society whose object was to suppress a sect to which the defendant belonged, the defendant being on trial for a riot in which sectarian prejudice was involved.³ And as to his relations to the defendant he may always be asked.⁴

§ 478. The inferences which arise from the refusal by a witness to answer questions involving alleged crimination are exclusively inferences of fact,⁵ having no support in

¹ Supra, § 474 ; infra, §§ 489, 596 a.

² See supra, § 376. For cases see Whart. on Ev. § 545 ; Fincher v. State, 58 Ala. 215.

³ People v. Christie, 2 Park. C. R. 579.

⁴ See cases supra, § 475 ; Scott v. State, 64 Ind. 400. Infra, § 485.

In Mayer v. People (N. Y. Ct. of App. 1880), 21 Alb. L. J. 336, F., an uncle and former employer of defendant, gave evidence tending to show the innocence of defendant, and also testified to a fact which if true would naturally induce the witness to believe him innocent. On cross-examination he was asked if he had not said to anybody that defendant and his partner "had been guilty of a great wrong;" that "they had acted as thieves," &c. It was ruled by the Court of Appeals (Church, C. J., and Danforth, J., diss.) that the questions were proper on cross-examination.

⁵ "Where a witness," says Mr. Roscoe (Cr. Ev. 8th ed. 158), "is entitled to decline answering a question,

and does decline, the rule is said by Holroyd, J., to be, that his not answering ought not to have any effect with the jury. R. v. Watson, 2 Stark. 157. So where a witness demurred to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address to the jury remarked upon the refusal, Abbott, C. J., interposed and said that no inference was to be drawn from such refusal. Rose v. Blakemore, Ry. & Moo. N. P. C. 384. A similar opinion was expressed by Lord Eldon, Lloyd v. Passingham, 16 Ves. 64. See the note Ry. & Moo. N. P. C. 385. And it was said by Bayley, J., in R. v. Watson, 2 Stark. 135, 'If the witness refuse to answer, it is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going too far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may.'

technical jurisprudence.¹ On the one hand, a pure man of great sensitiveness may indignantly refuse to tolerate such a question ; but if, on the other hand, the witness is not known to be a pure man of great sensitiveness, his refusal to answer will be naturally presumed to arise from the fact that if he answered the answer would be discreditable.²

may be drawn from refusal to answer.

§ 479. A witness's answers to questions relating to his previous conduct are regarded as so far collateral that they cannot be contradicted by the party cross-examining, unless they go to matter which the law permits to be shown for the purpose of impairing credibility.³ Even a party, when cross-examined as a witness as to previous misconduct similar to that under trial, concludes the party cross-examining him by his answers, unless such misconduct would be itself relevant as part of the case of the cross-examining party.⁴ And when a witness, being asked whether she had not when in service taken things not belonging to her, answered no ; this was held irrebuttable.⁵ But this principle applies only to the witness's *answers*. Whether the *questions* can be put is elsewhere discussed.⁶

On cross-examination witness's answers as to previous conduct are conclusive, and so as to matters collateral.

§ 480. How far a witness's answer, drawn from him by compulsion in a court of justice, can be used against him in another suit, will be discussed in a future chapter.⁷

Compelled answer cannot be used against witness.

XI. IMPEACHING AND SUSTAINING WITNESS.

§ 481. The rules relative to impeaching and sustaining witnesses are the same in criminal as in civil practice, and are discussed at large in my work on Evidence in Civil Issues.⁸ In the present volume we must confine ourselves to noticing only such of these rules as are of more frequent application in the practice of criminal courts.

Rules in criminal the same as in civil cases.

¹ See Taylor's Ev. § 1321; Andrews v. Fry, 104 Mass. 234.

² See infra, § 749.

³ Taylor's Ev. § 1295; Whart. on Ev. § 479.

⁴ Tolman v. Johnstone, 2 F. & F. 66; Stokes v. People, 53 N. Y. 164.

⁵ Stokes v. People, 53 N. Y. 164.

⁶ Whart. on Ev. §§ 533, 559. See Shepard v. Parker, 36 N. Y. 517.

⁷ See infra, § 664.

⁸ Party cannot discredit his own witness. Whart. on Ev. § 549.

A party's witnesses are those whom

§ 482. A witness called by the opposing party can be discredited by proving that on a former occasion he made a statement inconsistent with his statement on trial, provided such statement be material to the issue;¹ though a witness, after testifying to criminating facts, cannot be asked whether he has not previously said that in his opinion the defendant was not guilty.² The statement which it is intended to contradict must involve facts in evidence. If confined to opinion, when opinion is not at issue, or to other irrelevant matters, the cross-examining party is bound by the answer.³ A statement of opinion, however, that goes to show bias, is so far relevant that a denial of its expression is admissible.⁴ So the opinion of an expert when material may be discredited by proof that he had previously expressed a contradictory opinion.⁵ Nor is the right thus to contradict

Opposing witness may be contradicted by proving that he formerly stated differently.

he voluntarily examines in chief.

Whart. on Ev. § 550.

But usually must be first asked as to statements. Ibid. § 555.

Witness cannot be contradicted on matters collateral. Ibid. § 559.

By old practice conflicting witnesses could be confronted. Ibid. § 560.

Witness's answer as to motives may be contradicted. Ibid. § 561.

His character for truth and veracity may be attacked. Ibid. § 562.

Questions to be confined to this issue. Ibid. § 563.

Bias of witness may be shown. Ibid. § 566.

Infamous conviction may be proved as affecting credibility. Ibid. § 567.

Impeaching witness may be attacked and sustained. Ibid. § 568.

Impeached witness may be sustained. Ibid. § 569.

But not ordinarily by proof of former consistent statement. Ibid. § 570.

May be corroborated at discretion of court. Ibid. § 571.

¹ Whart. on Ev. § 551.

² Com. v. Mooney, 110 Mass. 99; State v. Maxwell, 42 Iowa, 208.

³ Greenl. Ev. § 449; Elton v. Larkins, 5 C. & P. 385; U. S. v. Holmes, 1 Cliff. 98; Brackett v. Weeks, 43 Me. 291; Dewey v. Williams, 43 N. H. 384; Sumner v. Crawford, 45 N. H. 416; Combs v. Winchester, 49 N. H. 13; Fletcher v. R. R. 1 Allen, 9; Com. v. Mooney, 110 Mass. 99; Howard v. Ins. Co. 4 Denio, 502; Bearss v. Copley, 10 N. Y. 93; Ford v. Com. 16 Grat. 547; Kennedy v. Com. 14 Bush, 341; Patten v. People, 18 Mich. 314; Lewis v. State, 4 Kans. 296; State v. Marler, 2 Ala. 43; Garrett v. State, 6 Mo. 1; People v. Devine, 44 Cal. 452. See State v. Reed, 60 Me. 550; McKern v. Calvert, 59 Mo. 244; McNeill v. Arnold, 22 Ark. 477.

⁴ Chapman v. Coffin, 14 Gray, 454; O'Neill v. Lowell, 6 Allen, 110; Emerson v. Stevens, 6 Allen, 112; Couillard v. Duncan, 6 Allen, 440; Gaines v. Com. 50 Penn. St. 319; Beaubien v. Cicotte, 12 Mich. 459; Robinson v. Blakely, 4 Rich. 586. See supra, §§ 457-60.

⁵ Saunderson v. Nashua, 44 N. H. 492.

limited to matters arising in the examination in chief. It extends to matters originating in the cross-examination; and then, if such matters are material, contradiction by this process is equally permissible.¹ Thus when the prosecuting witness, on the trial of an indictment for an indecent assault on her when driving, on being asked on cross-examination whether she had not said to the defendant subsequent to the event in litigation, that she would kiss him if he would take her to drive, denied she had said so, it was held that she could be contradicted by calling a witness to prove that she had made such a statement.² A witness, also, may be contradicted by proof of prior contradictory statements before a grand jury;³ or by proof that he now states facts which on a former trial he omitted to state.⁴ And generally whenever, on a former occasion, it was the duty of the witness to state the whole truth, it is admissible to show that the witness, in his statement, omitted facts sworn to by him at the trial.⁵

§ 483. As a basis for impeaching evidence of this class, it is usually requisite to ask the witness, on cross-examination, whether he has not made such prior contradictory statements. The question to this effect should specify, so it is said, the person to whom the alleged contradictory statements were made, and as far as possible the circumstances. Only upon a denial, direct or qualified, by the witness, that such statements were made, can proof of them be offered.⁶

Usually
witness
must first
be asked
as to such
statements.

¹ *Hogan v. Cregan*, 6 Robt. (N. Y.) 138.

² *Com. v. Bean*, 111 Mass. 438. To the same effect, *Fries v. Brugler*, 12 N. J. L. 79. See, however, as qualifying above, *State v. Patterson*, 2 Ired. L. 346; *Dunn v. Dunn*, 11 Mich. 284.

³ See *infra*, § 510; *Burdick v. Hunt*, 43 Ind. 381.

⁴ *Briggs v. Taylor*, 35 Vt. 57. See *Nye v. Merriam*, 35 Vt. 438.

⁵ *Whart. on Ev.* § 554; *Hayden v. Stone*, 112 Mass. 346; *Perry v. Breed*, 117 Mass. 165.

⁶ *Angus v. Smith*, 1 M. & M. 473; *Crowley v. Page*, 7 C. & P. 789; *R. v.*

Shellard, 9 C. & P. 277; *R. v. Holden*, 8 C. & P. 606; *The Queen's case*, 2 B. & B. 313; *M'Kenney v. Neil*, 1 McLean, 540; *Downer v. Dana*, 19 Vt. 338; *Everson v. Carpenter*, 17 Wend. 419; *Palmer v. Haight*, 2 Barb. 210; *Franklin Bank v. Navigation Co.* 11 Gill & J. 28; *Abel v. Shields*, 7 Mo. 120; *Weaver v. Traylor*, 5 Ala. 564; *Weinzorpfli v. State*, 7 Blackf. 186; *Regnier v. Cabot*, 2 Gilman, 34; *State v. Kinley*, 43 Iowa, 294; *Sealey v. State*, 1 Kelly, 213; *Drennen v. Lindsey*, 15 Ark. 359; *Treadway v. State*, 1 Tex. Ap. 668; *People v. Devine*, 44 Cal. 452. See for other cases *Whart. on Ev.* § 555. That they may

But the substance of the alleged conflicting statement is all that need be put to the witness,¹ though there must be a specification sufficient to enable the witness to recall the facts.² In some jurisdictions, however, it is not considered requisite to ask a witness beforehand whether he had not made a prior different statement;³ in other cases it has been left to the discretion of the court.⁴

At common law, as we have seen, when the statements are in writing, they must be first shown to the witness.⁵

Parties, when appearing as witnesses, may be in like manner contradicted.⁶

On reëxamination the impeached witness may be asked as to the details of the alleged contradiction.⁷

§ 484. When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question.⁸ “The test of whether a fact inquired of in cross-examination is collateral is this, Would the cross-examining party

be received when witness said, on cross-examination, that he was not aware of having made them, see *Payne v. State*, 60 Ala. 80.

¹ *Patchin v. Ins. Co.* 13 N. Y. 268; *Bennett v. O’Byrne*, 23 Ind. 604; *State v. Hoyt*, 13 Minn. 132; *Edwards v. Sullivan*, 8 Ired. 302; *Nelson v. Iverson*, 24 Ala. 9; *Armstrong v. Huffstutler*, 19 Ala. 51.

² *Pendleton v. Empire Co.* 19 N. Y. 13; *Joy v. State*, 14 Ind. 139. *Supra*, § 461.

³ *U. S. v. White*, 5 Cranch C. C. 457; *Howland v. Conway*, 1 Abb. Adm. 281; *Ware v. Ware*, 8 Greenl. 42; *Wilkins v. Babbershall*, 32 Me. 184; *New Portland v. Kingfield*, 55 Me. 172; *Titus v. Ash*, 24 N. H. 319; *Cook v. Brown*, 34 N. H. 460; *Hedge v. Clapp*, 22 Conn. 262. See *Brown v. Bellows*, 4 Pick. 188; *Gould v. Norfolk Co.* 9 Cush. 338; *Com. v. Hawkins*, 3 Gray, 463.

⁴ See *Sharp v. Emmet*, 5 Whart. 288; *McAteer v. McMullen*, 2 Barr,

32; *Kay v. Fredrigal*, 3 Barr, 221; *State v. Hoyt*, 13 Minn. 132.

⁵ *Supra*, § 156; and compare *Downer v. Dana*, 19 Vt. 338; *Bryan v. Walton*, 14 Ga. 185; *Molyneaux v. Collier*, 30 Ga. 731; *Hughes v. Wilkinson*, 35 Ala. 453. See *Samuels v. Griffith*, 13 Iowa, 103; *Bradford v. Barclay*, 39 Ala. 33.

⁶ *Gibbs v. Linabury*, 22 Mich. 479. See *supra*, § 433.

⁷ *State v. Winkley*, 14 N. H. 480. See, as to effect on credit, *Dunn v. People*, 29 N. Y. 523.

⁸ *R. v. Watson*, 2 Stark. R. 149; *U. S. v. Dickinson*, 2 McLean, 325; *U. S. v. White*, 5 Cranch C. C. 38; *State v. Kingsbury*, 58 Me. 239; *State v. Reed*, 60 Me. 550; *State v. Benner*, 64 Me. 267; *State v. Thibeau*, 30 Vt. 100; *Com. v. Buzzell*, 16 Pick. 153; *Com. v. Farrar*, 10 Gray, 6; *Rosenweig v. People*, 63 Barb. 634; *Stokes v. People*, 53 N. Y. 164; *Schenley v. Com.* 36 Penn. St. 29; *Fogleman v. State*, 32 Ind. 145; *Cokely v. State*, 4

be entitled to prove it as a part of his case, tending to establish his plea?"¹ This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief.²

§ 485. A witness's answers as to motives are not open to the criticism that has been applied to his answers as to prior misconduct. Hence, as has been already seen, it has been held that a witness may be asked whether he has not a strong interest in the case or hostility to the defendant,³ and if he denies such interest or bias, that he may be contradicted by evidence of his own statements, or of other implicative acts.⁴ The same rule applies to questions as to quarrels between the witness and the party against whom he is called.⁵ It is true that we have cases disputing this conclu-

Witness's
answer as
to motives
may be
contra-
dicted.

Iowa, 477; *Patten v. People*, 18 Mich. 314; *State v. Staley*, 14 Minn. 105; *Murphy v. Com.* 23 Grat. 960; *State v. Patterson*, 2 Ired. 346; *State v. Pully*, 63 N. C. 8; *State v. Roberts*, 81 N. C. 605; *State v. Elliott*, 68 N. C. 124; *Rosenbaum v. State*, 33 Ala. 354; *People v. Devine*, 44 Cal. 452.

Where a witness for the prosecution, on cross-examination, denied that the prosecutor paid him for coming from another State to be a witness, it was held, that the defendant could not introduce evidence to prove his declaration that he had been so paid. *State v. Patterson*, 2 Ired. 346.

But where the sole witness to the commission of an offence swore that she did not know the prisoner at the time, evidence was admitted for the defence that she had in fact known him for years. *R. v. Dennis*, 3 F. & F. 502.

¹ *Sharswood, J., Hildeburn v. Curran*, 65 Penn. St. 63; and see *Woodward v. Easton*, 118 Mass. 403. As to how far such contradiction may be extended, at the discretion of the court, see *Powers v. Leach*, 26 Vt. 270.

In *State v. Patterson*, 74 N. C. 157,

it was held that a woman's answer, in a bastardy suit, that she had never had sexual intercourse with A., was conclusive. As to materiality of such questions in rape see *supra*, § 473. Compare *Com. v. Pease*, 110 Mass. 412.

² *State v. Sargent*, 32 Me. 429; *Hastings v. Livermore*, 15 Gray, 10; *Whitney v. Boston*, 98 Mass. 312.

³ *Supra*, § 475.

⁴ *People v. Austin*, 1 Parker C. R. 154; *Gaines v. Com.* 50 Penn. St. 319; *Scott v. State*, 64 Ind. 400.

A witness, who testifies in a criminal case in favor of the defendant, may be asked, on cross-examination, if he has offered a certain person money to be a surety on the defendant's bail bond. *Com. v. Gallagher*, 126 Mass. 54.

⁵ *R. v. Yervin*, 2 Camp. 638; *R. v. Martin*, 6 C. & P. 562; *Thomas v. David*, 7 C. & P. 350; *Queen's case*, 2 B. & B. 311; *Davis v. Keyes*, 112 Mass. 436; *Beardsley v. Wildman*, 41 Conn. 515; *People v. Austin*, 1 Park. C. R. 154; *Gaines v. Com.* 50 Penn. St. 327; *Geary v. People*, 22 Mich. 220.

sion;¹ but it is hard to see how evidence which goes to the root of a witness's impartiality can be regarded as collateral to the issue.² We have already seen how the perceptive as well as the reproductive powers of the mind are swayed by prejudice. That a witness was under the influence of such prejudice is a fact without cognizance of which his testimony cannot be properly weighed.

§ 486. A witness may be discredited by evidence attacking his character for truth and veracity.³ Particular independent facts, though bearing on the question of veracity, cannot, however, be put in evidence for this purpose.⁴ Thus evidence has been rejected of declarations of a witness of his own want of religion;⁵ though it is held that it may be proved that a witness had declared that he would swear to anything.⁶ General character for "badness," or "infamy," is, for still stronger reasons, inadmissible.⁷ And it has been held inadmissible, in order to attack veracity, to prove the bad character of a female witness for chastity, or to show

Witness's
character
for truth
may be
attacked.

¹ *Harrison v. Gordon*, 2 Lew. C. C. 150; *R. v. Holmes*, L. R. 1 C. C. 237; *Harris v. Tippet*, 2 Camp. 637; *State v. Patterson*, 2 Ired. 346. As to the materiality of bias and motive see *supra*, § 376.

² *Supra*, §§ 376, 476-7.

³ *R. v. Rockwood*, 13 How. St. Tr. 210; *R. v. Brown*, L. R. 1 C. C. 70; *U. S. v. Vansickle*, 2 McLean, 219; *U. S. v. White*, 5 Cranch C. C. 38; *Starks v. People*, 5 Denio, 106. As to mode of proving character, *supra*, §§ 57, 63. See *Hamilton v. People*, 29 Mich. 173.

⁴ *Supra*, § 61; *R. v. Rockwood*, 13 How. St. Tr. 210; *U. S. v. Masters*, 4 Cranch C. C. 469; *U. S. v. Vansickle*, 2 McLean, 219; *State v. Bruce*, 24 Me. 71; *Crane v. Thayer*, 18 Vt. 162; *Com. v. Churchill*, 11 Met. 538; *Bakeman v. Rose*, 18 Wend. 146; *Johnson v. People*, 3 Hill (N. Y.), 178; *Southworth v. Bennett*, 58 N. Y. 659; *Crichton v. People*, 6 Park. C. R. 363; *Uhl v. Com.* 6 Grat. 706;

State v. Boswell, 2 Dev. 209; *Nugent v. State*, 18 Ala. 521; *Craig v. State*, 5 Oh. St. 605; *Walker v. State*, 6 Blackf. 1; *Ketchingman v. State*, 6 Wis. 426; *Taylor v. Com.* 3 Bush, 508; *Newman v. Mackin*, 21 Miss. 383.

Thus the credit of a witness cannot be impeached by showing that he has committed an infamous crime of which he has not been convicted. *Webb v. State*, 29 Oh. St. 351.

⁵ *Halley v. Webster*, 21 Me. 461.

⁶ *Newhal v. Wadhams*, 1 Root, 504; *Anon.* 1 Hill (S. C.), 251.

⁷ *State v. Bruce*, 11 Shepl. 71; *Com. v. Churchill*, 11 Met. 538; *State v. Sater*, 8 Iowa, 420; *Kilburn v. Muller*, 22 Iowa, 498; *State v. O'Neil*, 4 Ired. 88; *People v. Yslas*, 27 Cal. 630; though see *Carpenter v. Wall*, 11 Ad. & El. 803; *Wright v. Paige*, 36 Barb. 143; *State v. Boswell*, 2 Dev. 209; *State v. Shields*, 13 Mo. 236; *State v. Breeden*, 58 Mo. 507; *Gilham v. State*, 1 Head, 38.

that she is a prostitute;¹ or to prove habits of intemperance, which do not affect the perceptive or narrative powers.²

§ 487. As a preliminary question the impeaching witness should be asked as to the impeached witness's general character or reputation for truth and veracity in the community in which he has lived,³ but as to bad character in other respects no inquiries can be made.⁴ It is inadmissible to ask what character the impeached witness had in a neighborhood in which he did not then reside;⁵ or resided at a period long prior to the trial.⁶ But evidence of bad reputation for veracity four years previous to the trial is held admissible to impeach a witness who had no fixed domicil, and had been out of the State over a year of the time, and whose residence at the place of such reputation was as long as at any other.⁷ A stranger sent into a community to learn the character of a witness is not competent to testify to such character.⁸ "Character," in the sense in which it is used in the questions so authorized, is to be viewed as convertible with "reputation."⁹ It is

Questions to be limited by time and place.

¹ *R. v. Martin*, 6 C. & P. 562; *R. v. Hodgson*, R. & R. 211; *Low v. Mitchell*, 6 Shepl. 372; *Wilds v. Blanchard*, 7 Vt. 141; *Com. v. Churchill*, 11 Met. 530, overruling *Com. v. Murphy*, 14 Mass. 387; *Com. v. Billings*, 97 Mass. 405; *Jackson v. Lewis*, 13 Johns. 504; *Kilburn v. Mullen*, 22 Iowa, 498; *State v. Larkin*, 11 Nev. 314; *Pleasant v. State*, 15 Ark. 624; *People v. Yslas*, 27 Cal. 630. See *Indianapolis R. R. v. Anthony*, 43 Ind. 183.

² *Thayer v. Boyle*, 30 Me. 373; *Hoitt v. Moulton*, 21 N. H. 586. See *supra*, §§ 57-63.

³ *Teese v. Huntingdon*, 23 How. 2; *U. S. v. Vansickle*, 2 McLean, 219; *State v. Randolph*, 24 Conn. 363; *People v. Mather*, 4 Wend. 229; *Bucklin v. State*, 20 Ohio, 18; *Stokes v. State*, 18 Ga. 17; *Pleasant v. State*, 15 Ark. 624. See *Com. v. Lawler*, 12 Allen, 585; and other cases cited *Whart. on Ev.* § 487.

⁴ *Kidwell v. State*, 63 Ind. 384.

As to how far, in rape, the prosecutrix may be cross-examined as to chastity, see *Whart. Crim. Law*, 8th ed. § 568.

⁵ *Conkey v. People*, 5 Park. C. R. 31; *Griffin v. State*, 14 Oh. St. 55; *Campbell v. State*, 23 Ala. 44; and other cases cited *Whart. on Ev.* § 487.

⁶ *State v. Howard*, 9 N. H. 485; *Rogers v. Lewis*, 19 Ind. 405; *Aurora v. Cobb*, 21 Ind. 492; *Keator v. People*, 32 Mich. 485; *Young v. Com.* 6 Bush, 307; *Mitchell v. Com. Ky.* 1880. See *Com. v. Billings*, 97 Mass. 405; *People v. Abbott*, 19 Wend. 192, as indicating limits as to time.

⁷ *Keator v. People*, 32 Mich. 481.

⁸ *Reid v. Reid*, 17 N. J. Eq. 101.

⁹ *Supra*, § 58; *Whart. on Ev.* §§ 49, 564. See *Strong, J., Knode v. Williamson*, 17 Wall. 588; and *supra*, §§ 57, 63, to the position that disparaging facts cannot be introduced. And compare *State v. Parks*, 3 Ired. 296; *State v. Speight*, 69 N. C. 72.

ordinarily sufficient if the witness says he can speak the general sense of those of the community who are acquainted with the impeached witness, or among whom the impeached witness moves.¹ Supposing the impeaching witness be shown to be competent to express an opinion, he may then be asked whether he would believe the impeached witness on his oath.² But it has been held not essential, in order to throw discredit on the impeached witness, that the impeaching witness should state that he would not believe the impeached witness on his oath.³ The impeaching witness, who has sworn to the bad character of the impeached witness for truth, may be asked on cross-examination who he had heard thus disparage the impeached witness;⁴ and what other grounds he had for his conclusion.⁵ The court may, at its discretion, limit the number of impeaching witnesses to be examined.⁶

§ 488. After ground has been duly laid by cross-examination, it is admissible to impeach a witness by showing his bias, under conditions which have been already stated.⁷

¹ *Kimmel v. Kimmel*, 3 S. & R. 336; *Dave v. State*, 22 Ala. 23; *Elam v. State*, 25 Ala. 53; *Ward v. State*, 28 Ala. 53. See *State v. Lee*, 22 Minn. 407.

The impeaching witness must speak directly to the reputation in the community. What he has heard others say of the reputation will not do. *Furnish v. Com.* 14 Bush, 180.

That the fact that nothing is said against the character of the witness is admissible to sustain his reputation for veracity see *State v. Grate*, 68 Mo. 22. *Supra*, § 58.

² *R. v. Brown*, 10 Cox C. C. 453; *S. C., L. R.* 1 C. C. 70; *Mawson v. Hartsink*, 4 Esp. 103; *Gass v. Stinson*, 2 Sumner, 610; *People v. Mather*, 4 Wend. 229; *People v. Rector*, 19 Wend. 569; *Bogle v. Kreitzer*, 46 Penn. St. 465; *Hamilton v. People*, 29 Mich. 185; *Keator v. People*, 32 Mich. 484; *Wilson v. State*, 3 Wis. 798; *Stokes v. State*, 18 Ga. 17; *Mc-*

Cutchen v. McCutchen, 9 Porter, 650; *Henderson v. Hayne*, 2 Metc. (Ky.) 342. See also *Phillips v. Kingfield*, 1 Applet. 375; *Kimmel v. Kimmel*, 3 S. & R. 336; *Wike v. Lightner*, 11 S. & R. 198; *Robinson v. State*, 16 Fla. 835; *People v. Tyler*, 35 Cal. 553. As disputing this question see 1 Greenl. Ev. § 461; as vindicating it see *Hillis v. Wylie*, 26 Oh. St. 574; *Hamilton v. People*, 29 Mich. 185; *State v. Caveness*, 78 N. C. 484.

³ *People v. Tyler*, 35 Cal. 353.

⁴ *Bates v. Barber*, 4 Cush. 197; *Weeks v. Hull*, 19 Conn. 376; *Lower v. Winters*, 7 Cow. 263; *People v. Annis*, 13 Mich. 511; *State v. Perkins*, 66 N. C. 126. *Infra*, § 470.

⁵ *Titus v. Ash*, 24 N. H. 319; *Pierce v. Newton*, 13 Gray, 528; *Bullard v. Lambert*, 40 Ala. 204.

⁶ *Bunnell v. Butler*, 23 Conn. 65; *Bissell v. Cornell*, 24 Wend. 354; *Gray v. St. John*, 35 Ill. 222; *Cox v. Pruitt*, 25 Ind. 90.

⁷ *Supra*, §§ 475-7, 485.

When the object is to prove hostile declarations or acts, the witness, as we have seen, must first be cross-examined as to such declarations or acts, so that he may have an opportunity for explanation. A witness cannot, it is said, be asked if he is not prejudiced against a particular party. He must be asked as to particular facts or conditions.¹ So a witness may be impeached by proof that he stated, after having testified, that he had been hired so to do.²

§ 489. In most States, as we have seen,³ a conviction of an infamous crime no longer renders a person incompetent as a witness. The record of conviction, however, by the law of several jurisdictions, may be put in evidence in order to impeach credibility.⁴ Such conviction, as has been stated, must be proved by record ;⁵ though it is admissible to ask a witness whether he has not been in the penitentiary.⁶ A verdict of guilty, without judgment, is not a "conviction."⁷ But a pardon does not preclude such conviction from being put in evidence.⁸

¹ See Whart. on Ev. § 566.

² McGinnis v. Grant, 42 Conn. 77.

³ Supra, § 363.

⁴ State v. Watson, 65 Me. 74; Com. v. Knapp, 9 Pick. 496; Com. v. Gorham, 99 Mass. 420; Real, in re, 55 Barb. 186; Donahue v. People, 56 N. J. 208. See Dickinson v. Dustin, 21 Mich. 561; Glenn v. Clove, 42 Ind. 62; Jefferson R. R. v. Riley, 39 Ind. 368; Johnson v. State, 48 Ga. 116.

Under the Massachusetts General Statutes the conviction of any crime may be shown for this purpose. Com. v. Hall, 4 Allen, 305.

⁵ Supra, §§ 153, 474.

⁶ Supra, § 474; Real v. People, 42 N. Y. 270, cited supra, § 474.

⁷ See cases cited supra, § 365.

⁸ The authorities to this effect are well grouped in the following opinion:—

"If the king pardon these offenders, they are thereby rendered competent witnesses, though their credit

is to be still left to the jury, for the king's pardon takes away *poenam et culpam in foro humano* but yet it makes not the man always an honest man." 2 Hale P. C. 278; King v. Castlemain, 7 How. St. Tr. 1109, 1110; King v. Rockwood, 13 How. St. Tr. 185, 186; 1 Stark. Ev. 99; Peake Ev. 132; McNally Ev. 232, 234; 1 Gilbert Ev. (by Lofft, ed. of 1791), 260; 1 Phillipps Ev. (old ed.) 29; 1 Gr. Ev. § 377; 2 Saund. Pl. & Ev. 1275; 1 Arch. Crim. Pr. & Pl. 155; 1 Arch. N. P. 29; Bac. Abr. Pardon (H.); 3 Wooddeson, Lectures on Laws of Eng. 284; 2 Harg. Jurid. Arguments, 221, 233, 260, 267; 2 Russell on Cr. 975, note; Roscoe Cr. Ev. 137, note; 2 Am. L. Reg. N. S. 488; U. S. v. Jones, 2 Wheel. C. C. 451; Baum v. Clause, 5 Hill, 196; Carpenter v. Nixon, 5 Hill, 260; Newcomb v. Griswold, 24 N. Y. 300; Gardner v. Bartholomew, 40 Barb. 325; Com. v. Green, 17 Mass. 515, 550, 551; Com. v. Rogers (Pamph.

When a record of conviction is offered for the purpose of discrediting (not excluding) a witness, it may be impeached.¹

§ 490. The character of an impeaching witness for truth and veracity may be itself attacked,² and may be sustained by countervailing proof.³ And the impeaching witness may be required to specify the persons who have spoken disparagingly of the impeached witness.⁴

Impeach-
ing witness
may be at-
tacked and
sustained.

§ 491. Under the same general conditions as those expressed as limiting the impeaching of witnesses, the party calling a witness may sustain him by calling witnesses to show that his reputation for truth and veracity is good, and

Impeached
witness
may be
sustained.

Rep.), 39, 148, 179, 180, 231, 249, 256, 271; *Hoffman v. Coster*, 2 Whart. 453, 462; *Howser v. Com.* 51 Penn. St. 332, 340; *Anglea v. Com.* 10 Grant, 696, 698, 699, 703, 704; 2 Hume Cr. L. 344; *Glassford Ev.* 413.

"A person convicted of an offence known in law as infamous is incapacitated to be a witness, because, when his guilt is established by conviction, his general character for truth is shown to be so bad that his testimony would be useless or dangerous. 1 Gr. Ev. § 372; 1 Stark. Ev. 94. That is the theory of the common law. The conviction is an impeachment and condemnation of his general character for truth. A pardon is not presumed to be granted on the ground of innocence or total reformation. *Cook v. Middlesex*, 2 Dutcher, 326, 331, 333; 4 Bl. Com. 397, 400; 3 Inst. 233, 238; 2 Hawk. P. C. c. 37, s. 8; *Com. v. Halloway*, 44 Penn. 210. It removes the disability, but does not change the common law principle, that the conviction of an infamous offence is evidence of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the ex-

ecutive or legislative branch of the government.

"If the party against whom an infamous person is offered as a witness had the election of using the conviction as a ground of exclusion, or of an attack upon the credit of the witness, the testimony of the witness might be warped by the fear of impeachment and the hope of avoiding it; and that may be a sufficient reason for not allowing such election.

"When the character of a pardoned witness is impeached by the record of his conviction, it would seem that his character may be sustained by appropriate evidence." *Doe, J., Curtis v. Cochran*, 50 N. H. 244.

¹ *Sims v. Sims*, 75 N. Y. 466. See *supra*, § 154; *infra*, § 596 a.

² *Long v. Lamkin*, 9 Cush. 361; *Starks v. People*, 5 Denio, 106; *State v. Brant*, 14 Iowa, 180; *State v. Moore*, 25 Iowa, 128; *State v. Cherry*, 63 N. C. 493.

³ *Lemons v. State*, 4 W. Va. 755. See *State v. Howard*, 9 N. H. 485; *Davis v. State*, 38 Md. 15, 50; *Stratton v. State*, 45 Ind. 468; *State v. Perkins*, 66 N. C. 126; *Durham v. State*, 45 Ga. 516.

⁴ *Weeks v. Hull*, 19 Conn. 376; *Lower v. Winters*, 7 Cow. 263; *State v. Perkins*, 66 N. C. 126.

that the sustaining witnesses would believe him on his oath,¹ and it has been held that the inquiries, in such case, may range over the witness's whole prior history in other places.² Such rebutting evidence is made admissible by the mere fact that the impeaching party examines an impeaching witness as to the impeached witness's character for truth, though the impeaching witness answers favorably.³ It is further held that such evidence may be admitted on particular discrediting facts being developed against the witness in his cross-examination,⁴ especially when he is in the situation of a stranger, testifying to isolated facts.⁵ *A fortiori* is this the case when the opposing party introduces, as part of his case, evidence directly reflecting on the veracity of the witness.⁶ Thus a witness's character is so far impeached by putting in evidence his conviction of a felony, that evidence is admissible of his good reputation for truth.⁷ A mere conflict of testimony, however, will not justify introduction of evidence to back up the witnesses thus conflicting.⁸ Nor can such testimony be received, so it has sometimes been ruled, merely upon proof of prior conflicting statements of the witness.⁹

¹ *R. v. Murphy*, 19 How. St. Tr. 724; *R. v. Clarke*, 2 Stark. 241; *Com. v. Ingraham*, 7 Gray, 46; *Frazer v. People*, 54 Barb. 306; *People v. Davis*, 21 Wend. 309; *Lemons v. State*, 4 W. Va. 755; *Harris v. State*, 30 Ind. 181; *Clem v. State*, 38 Ind. 419; *State v. Cherry*, 63 N. C. 493; and other cases cited Whart. on Ev. § 491.

² *Morse v. Palmer*, 15 Penn. St. 51; *Stratton v. State*, 45 Ind. 468; *State v. Lanier*, 79 N. C. 622; *Burrell v. State*, 18 Tex. 718.

³ *Com. v. Ingraham*, 7 Gray, 46.

⁴ See *Harrington v. Lincoln*, 4 Gray, 563; *People v. Rector*, 19 Wend. 569; *Lewis v. State*, 35 Ala. 380; *People v. Ah Fat*, 48 Cal. 62.

⁵ *Merriam v. R. R.* 20 Conn. 354. See *Brown v. Mooers*, 6 Gray, 451.

⁶ *Prentiss v. Roberts*, 49 Me. 127; *Isler v. Dewey*, 71 N. C. 14.

⁷ 2 Phil. Ev. 5th Am. ed. 95; *State v. Roe*, 12 Vt. 111; *Paine v. Tilden*,

20 Vt. 554. See, however, *Doe v. Harris*, 7 Car. & P. 330; *People v. Amanacus*, 50 Cal. 233.

On the other hand, it is held that the testimony of a witness, upon cross-examination, that he had been tried for a crime in another State and acquitted, does not authorize the party calling him to introduce evidence of his general character for truth and integrity. Whether such evidence would be admissible, if it had not appeared that he was acquitted on that trial, was doubted. *Harrington v. Lincoln*, 4 Gray, 563.

⁸ *Starks v. People*, 5 Denio, 106; *Johnson v. State*, 21 Ind. 329. See, however, *People v. Schweitzer*, 28 Mich. 301; *Davis v. State*, 38 Md. 15, 50; *Wade v. Thayer*, 40 Cal. 478; and Whart. on Ev. § 491.

⁹ *Brown v. Mooers*, 6 Gray, 451; *Stamper v. Griffin*, 12 Ga. 450; *Newton v. Jackson*, 23 Ala. 335. See,

Whether, after a record of a conviction has been introduced in order to discredit a witness, it is admissible to sustain him by evidence of his innocence of the offence of which he was convicted, is elsewhere considered.¹ In any view, general good character, as distinguished from reputation for truth, cannot be proved.² If it should appear that he was *acquitted* on a criminal trial, exculpatory evidence is, as we have seen, inadmissible.³

The witness may be recalled to substantiate his own testimony.⁴

§ 492. When a witness is assailed on the ground that he narrated the facts differently on former occasions, while on reëxamination it is competent for him to give the circumstances under which such narration was made,⁵ it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those made on the trial.⁶ On the other hand, where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted.⁷ Thus where on an indictment for perjury

however, *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23; *Webb v. State*, 29 Oh. St. 351.

¹ *Infra*, § 596 *a*. See *Gardner v. Bartholomew*, 40 Barb. 325.

² *Heywood v. Reed*, 4 Gray, 574; *People v. Gay*, 7 N. Y. 378.

³ *Harrington v. Lincoln*, 4 Gray, 63.

⁴ *State v. George*, 8 Ired. 324.

⁵ *State v. Reed*, 62 Me. 129.

⁶ *Whart. on Ev.* § 492; *R. v. Parker*, 3 Dougl. 242; *Berkeley Peerage case*, cited 2 Ph. Ev. 445; *U. S. v. Holmes*, 1 Cliff. 98; *State v. Kingsbury*, 58 Me. 238; *Sidelinger v. Bucklin*, 64 Me. 371; *Com. v. Jenkins*, 10 Gray, 485; *Robb v. Hackley*, 23 Wend. 50; *People v. Finnegan*, 1 Parker C. R. 147; *Com. v. Carey*, 2 Brewst. 404; *State v. Thomas*, 3 Strobh. 269; *Nichols v. Stewart*, 20 Ala. 358; *State v. Vincent*, 24 Iowa, 570.

⁷ *Taylor's Ev.* § 1330; 1 *Stark. Ev.* 253; 3 *Rus. on Cr.* 593; 2 *Phil. Ev.* §

445; *Henderson v. Jones*, 10 S. & R. 410; *Cooke v. Curtis*, 6 H. & J. 86; *Stolp v. Blair*, 68 Ill. 543; *Coffin v. Anderson*, 4 Blackf. 395; *Daily v. State*, 28 Ind. 285; *Clark v. Bond*, 29 Ind. 555; *State v. Vincent*, 24 Iowa, 570; *State v. George*, 8 Ired. 324; *State v. Dove*, 10 Ired. 469; *March v. Harrell*, 1 Jones, 329; *Lyles v. Lyles*, 1 Hill Ch. (S. C.) 76; *People v. Doyell*, 48 Cal. 85.

In Indiana it has been held that if a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be corroborated by evidence of other statements made by him in accordance with his testimony. *Coffin v. Anderson*, 4 Blackf. 395; *Beauchamp v. State*, 6 Blackf. 300; *Harris v. State*, 30 Ind. 131. And the right is not limited to declarations before the impeached declarations. *Brookbank v. State*, 55 Ind. 169. But

a witness for the prosecution swore that B. (the defendant in a trial for arson) was not at the place of the burning at the time of the fire, but was confronted at his cross-examination by his testimony to the contrary on the arson trial, it was held that as he had been thus discredited, he might be sustained by showing that he had made to C., immediately after the arson, a statement in harmony with that made by him on the perjury trial, though the particulars of the statement were inadmissible.¹

In prosecutions for rape, the fact that the prosecutrix, immediately after the offence, made complaint, is also admissible, as part of the evidence in chief.² And so, it is said, as to other outrages.³

if he has not been so impeached, he cannot be corroborated in that way. *Coffin v. Anderson*, 4 Blackf. 395; *Clark v. Bond*, 29 Ind. 555.

See also *French v. Merrill*, 6 N. H. 465; *Hotchkiss v. Ins. Co.* 5 Hun, 91; *Com. v. Wilson*, 1 Gray, 88; *Dossett v. Miller*, 3 Sneed, 72; *Jackson v. Etz*, 5 Cow. 314; *State v. Dennin*, 32 Vt. 158; *Maitland v. Bank*, 40 Md. 540; *Deshon v. Ins. Co.* 11 Met. 199.

¹ *R. v. Neville*, 6 Cox C. C. 69. See discussion in *London Law T.* May 25, 1878.

² *Supra*, § 273; *Whart. Crim. Law*, 8th ed. § 566. See *State v. De Wolf*, 8 Conn. 98; *Conkey v. People*, 5 Parker C. R. 31, where such statements were received in corroboration of her testimony.

³ "The same rule," it is said by Mr. Roscoe, *Crim. Ev.* p. 26, "applies to other cases as to rape; namely, that where a person has been in any way outraged, the fact that this person made a complaint is good evidence, both relevant and admissible. Thus, in *R. v. Wink*, 6 C. & P. 397, upon an indictment for robbery, evidence was given (without objection) by the prosecutor, that he made a complaint the next morning to a constable. He

also stated (no objection being made) that he mentioned the name of a person, as the name of one of the persons who had robbed him, but this seems objectionable. The counsel for the prosecution then proposed to ask whose name was mentioned, but Patterson, J., refused to permit it, adding, 'but, when you examine the constable, you may ask him whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person, and if he did who that person was.' *Cresswell, J.*, in the case of *R. v. Osborne*, Car. & M. 622, objects to the latter part of this dictum; but the questions suggested are certainly very common, and rarely objected to, and indeed they hardly seem objectionable. On an indictment for shooting at the prosecutor, Patterson, J., held that evidence was admissible to show that the prosecutor, immediately after the injury, had made communication of the fact to another, but that the particulars could not be given in evidence. *R. v. Ridsdale*, York Spring Assizes, 1837; *Stark. Ev.* 469, n.

"There is a case of *R. v. Foster*, 6 C. & P. 325, in which the prisoner was charged with manslaughter. A wagoner was called, who stated that im-

XII. REEXAMINATION.

§ 493. A party, when matters testified to on his own side require explanation,¹ or when new matter is introduced by the opposing interest, has a right in rebuttal to re-examine his witnesses, though as to new matter of his own he cannot ordinarily re-examine.²

Party may
re-examine
witness.

mediately after the accident he went up to the deceased, and asked him what was the matter. It was objected that the reply of the deceased, which went to explain the cause of the accident, was not evidence; but Gurney, B., said that it was the best possible testimony that, under the circumstances, could be adduced to show what it was that had knocked the deceased down; and he added that the case of *Aveson v. Lord Kinnaird* (infra, p. 30) bore strongly upon the point. A somewhat similar case is that of *Thompson et ux. v. Trevanion*, Skin. 402, where, in an action for an assault upon the wife, Holt, C. J., allowed what the wife said 'immediate upon the hurt received, and before that she had time to devise and contrive anything for her own advantage,' to be given in evidence. But it is added that these two cases are difficult to reconcile with established principles. It is to be observed that both extend to the particulars of what was said; and, though they were both made in close proximity to the event to which they profess to relate, it seems

very questionable indeed whether that ground alone, as is presumed by Lord Holt, is sufficient to render them admissible." In this criticism, Cockburn, C. J., in a pamphlet already cited (supra, § 263), concurs.

¹ The rule with regard to re-examinations is thus laid down by Abbott, C. J., in *The Queen's case*, 2 B. & B. 297: "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. I distinguish between a conversation which a witness may have had with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject matter of

² See Whart. on Ev. § 572; and see *Queen's case*, 2 B. & B. 297; *R. v. St. George*, 9 C. & P. 488; *Prince v. Samo*, 7 A. & E. 627; S. C., 3 N. & P. 139; *Com. v. Wilson*, 1 Gray, 337; *Baxter v. Abbott*, 7 Gray, 71; *Campbell v. State*, 23 Ala. 44; *State v. Denis*, 19 La. An. 119; *State v. Scott*, 24 La. An. 161; *People v. Keith*, 50 Cal. 137.

"It is within the discretion of the court to permit any question to be asked on re-direct examination which it was proper to have admitted on the examination in chief." *Cooley, J., Hemmens v. Bentley*, 32 Mich. 89. See *Anderson v. State*, 42 Ga. 9; *Donnelly v. State*, 26 N. J. L. 463; *Stockwell v. Holmes*, 33 N. Y. 53; Whart. Cr. Pl. & Pr. §§ 564 et seq.

§ 494. The trial judge may, at his discretion, permit a witness to be recalled in order to be reexamined by the party recalling him.¹ As a matter of discretion, however, this is not reviewable by the appellate court,² unless it appear that the error goes to the merits of the case.³ So a witness may, at the discretion of the court, be permitted to

Witness
may be re-
called.

the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, — provided only that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against the party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion." In *Prince v. Samo*, 7 A. & E. 627; the Court of Queen's Bench said they could not assent to the doctrine laid down in the above case; and they held, that when a statement made by a party to a suit, in giving evidence on a former trial, has been got out in cross-examination, only so much of the remainder of the evidence is allowed to be given on reexamination as tends to qualify or explain the statement made on cross-examination. Recognized in *Sturge v. Buchanan*, 10 A. & E. 605.

When one of the plaintiff's witnesses stated on cross-examination facts not strictly evidence, but which might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-

examine upon them. *Blewitt v. Tregoning*, 3 A. & E. 554.

¹ 2 Phil. Ev. 408; *Bevan v. McMahon*, 2 Sw. & Tr. 55; *Phettiplace v. Sayles*, 4 Mason, 312; *U. S. v. Wilson*, 1 Bald. 78; *Com. v. Moulton*, 4 Gray, 39; *Com. v. Dam*, 107 Mass. 210; *State v. Alford*, 31 Conn. 40; *Webb v. State*, 29 Oh. St. 351; *State v. Ruhl*, 8 Clarke (Iowa), 447; *State v. Porter*, 34 Iowa, 241; *Thomas v. State*, 27 Ga. 287; *State v. Haynes*, 71 N. C. 79; *State v. Linney*, 52 Mo. 40; *State v. Jones*, 64 Mo. 391; *Dove v. State*, 3 Heisk. 348; *People v. Cotta*, 49 Cal. 632. See Whart. Cr. Pl. & Pr. § 566.

² *People v. Mather*, 4 Wend. 229; *Covanhoven v. Hart*, 21 Penn. St. 495; *Howell v. Com.* 5 Grat. 664; *White v. Bailey*, 10 Mich. 155; *Williams v. Allen*, 40 Ind. 295; *Ross v. Hayne*, 3 Greene, 211; *State v. Rorabacher*, 19 Iowa, 154; *State v. Haynes*, 71 N. C. 79; *State v. Silver*, 3 Dev. 332; *Colclough v. Rhodus*, 2 Rich. 76; *Jesse v. State*, 20 Ga. 156; *Bigelow v. Young*, 30 Ga. 121; *Gayle v. Bishop*, 14 Ala. 552; *Freleigh v. State*, 8 Mo. 606; *German Bk. v. Kerlin*, 53 Mo. 382; *Cotton v. Jones*, 37 Tex. 34. That a witness may be recalled even after the case is closed see *State v. Alford*, 31 Conn. 40; *Com. v. Moulton*, 4 Gray, 39; *Com. v. Dam*, 107 Mass. 210.

³ *People v. Cole*, 43 N. Y. 508; *Thompson v. State*, 37 Tex. 121. See Whart. Cr. Pl. & Pr. § 566.

return to the stand, after dismissal, to correct his testimony.¹ A witness may also be recalled at the request of the jury.²

§ 495. Whenever explanation is required of answers on re-examination, then the cross-examining party may re-cross-examine, confining himself to the new matter introduced on the reëxamination.³ It is, however, at the discretion of the court to close such re-cross-examination when the party seeking it has had abundant prior opportunity to draw out his case.⁴

Re-cross-examination permitted at discretion of court.

XIII. PRIVILEGED COMMUNICATIONS.

§ 496. A lawyer is not permitted to disclose communications made to him by his client in the course of their professional relations.⁵ Nor is the privilege in any way affected by the statutes making parties witnesses;⁶ though there is, as we will see, a conflict of authority whether a party making himself a witness can refuse to answer as to his confidential communications to his counsel.⁷ Nor does the privilege cease to operate because a friend was present with the client at the interview.⁸

Lawyer not permitted to disclose communications of client.

The privilege extends to all knowledge possessed by the lawyer which he would not have obtained if he had not been consulted professionally by his client.⁹

¹ *Kingston v. Tappen*, 1 Johns. Ch. 368; *Walker v. Walker*, 14 Ga. 242; *Dunn v. Pipes*, 20 La. An. 276.

² *Van Huss v. Rainbolt*, 2 Coldw. 139.

³ *Wood v. McGuire*, 17 Ga. 303.

⁴ *Com. v. Nickerson*, 5 Allen, 518; *State v. Hoppiss*, 5 Ired. 406.

⁵ Whart. on Ev. § 495; *Cromack v. Heathcote*, 2 B. & B. 4; *Skinner v. R. R. L. R.* 9 Exch. 298; *Woolley v. R. R. L. R.* 4 C. P. 602; *Maxham v. Place*, 46 Vt. 434; *Britton v. Lorenz*, 45 N. Y. 57; *Graham v. People*, 63 Barb. 468; *Bowers v. State*, 29 Oh. St. 542; *Jenkinson v. State*, 5 Blackf. 465; *Orton v. McCord*, 33 Wis. 205; *Chahoon v. Com.* 21 Grat. 822; *State v. Hazleton*, 15 La. An. 72.

⁶ *Montgomery v. Pickering*, 116 Mass. 227; *Brand v. Brand*, 39 How. (N. Y.) Pr. 193; *Barker v. Kuhn*, 38 Iowa, 395. See *supra*, § 427.

⁷ *Infra*, § 499; *Woburn v. Henshaw*, 101 Mass. 193.

⁸ *Bowers v. State*, 29 Oh. St. 542.

⁹ *Greenough v. Gaskell*, 1 M. & K. 98.

A., being charged with embezzlement, retains B., a barrister, to defend him. In the course of the proceedings, B. observes that an entry has been made in A.'s account book, charging A. with the sum said to have been embezzled, which entry was not in the book at the commencement of B.'s employment. This being a fact observed by B. in the course of his employment, showing that a fraud has

§ 497. A formal retainer is not necessary to constitute a relationship whose communications the law will treat as inviolable.¹ It is enough, to enable the protection of the law to apply, that a legal adviser is sought for the purpose of confidential professional advice, "with a view either to the prosecution of a claim, or a defence against a claim."² An attorney, however, has been compelled to testify as to non-confidential statements made to him, before retainer, by one who afterwards became his client.³ An injunction of secrecy is not necessary to protect the communications.⁴

Not necessary that relationship should be formally instituted.

§ 498. A client may surrender his privilege by consent that his counsel should be examined,⁵ which consent cannot be implied by the client merely calling the lawyer as a witness, without examining him as to such communications.⁶ If he do not, dissolution of their connection, no matter how it may occur, works no change in regard to the inviolability of their intercourse.⁷ Even death does not have this effect.⁸

Nor is privilege lost on termination of relationship.

§ 499. Communications which the lawyer is precluded from disclosing the client cannot be compelled to disclose.⁹ Where, however, a party offers himself as a witness, it

Client cannot be compelled

been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A. against the prosecutor in the original case for malicious prosecution. *Brown v. Foster*, 1 H. & N. 736. *Stephen's Ev. art. 115.*

¹ *Ross v. Gibbs*, L. R. 8 Eq. 522; *Foster v. Hall*, 12 Pick. 89; *Beltzhoover v. Blackstock*, 3 Watts, 20.

² Sir John Stuart, in *Ross v. Gibbs*, L. R. 8 Ex. 522; S. P., *Wilson v. R. R.* L. R. 14 Eq. 477; *Minet v. Morgan*, L. R. 8 Ch. 361; *Sargent v. Hampden*, 38 Me. 581; *Foster v. Hall*, 12 Pick. 89; *March v. Ludlam*, 8 Sandf. Ch. 35; *Beltzhoover v. Blackstock*, 3 Watts, 20. See, however, *Wilson v. Rastall*, 4 T. R. 753.

Communications by a married woman to her husband's attorney, as to her separate interests, are priv-

ileged. *Scranton v. Stewart*, 52 Ind. 68.

³ *Cutts v. Pickering*, 1 Ventr. 197. See *R. v. Avery*, 8 C. & P. 596; *R. v. Tuff*, 1 Den. C. C. 334, and discussion in *Roscoe's Cr. Ev.* 8th ed. 153.

⁴ *Wheeler v. Hill*, 16 Me. 329.

⁵ *Infra*, § 500; *Merle v. More*, Ry. & M. 390.

⁶ *Vaillant v. Dodemead*, 2 Atk. 524; *Bate v. Kinsey*, 1 C., M. & R. 38.

⁷ *Wilson v. Rastall*, 4 T. R. 759; *Cholmondeley v. Clinton*, 19 Ves. 268; *Charlton v. Coombes*, 4 Giff. 372; *Calley v. Richards*, 19 Beav. 401; *Russell v. Jackson*, 9 Hare, 387; *Chant v. Brown*, 7 Hare, 79.

⁸ *Foster v. Hall*, 12 Pick. 89; *Moore v. Bray*, 10 Barr, 520.

⁹ *Thompson v. Falk*, 1 Drew. 21; *Vent v. Pacey*, 4 Russ. 193; *Combe v. London*, 1 Russ. 631; *Holmes v.*

to disclose
his com-
munica-
tions.

has been said that he may be asked as to his communications to his counsel,¹ though the better opinion is to the contrary.²

Privilege
must be
claimed in
order to be
applied,
and may
be waived.

§ 500. The protection insured by the relationship of lawyer and client may be lost when not claimed by the party privileged;³ though it is held not to be extinguished by compromise of the suit.⁴ While the privilege may be waived by the client, the evidence of the waiver must be distinct and unequivocal.⁵

Communi-
cations, to
be privi-
leged,
must be
made to
party's ex-
clusive ad-
viser.

§ 501. When two or more persons address a lawyer as their common agent, so far as concerns a stranger their communications to the lawyer would be privileged. It is otherwise, however, as to themselves; and as they stand on the same footing as to the lawyer, either can compel him to testify against the other as to their negotiations.⁶

Lawyer
not privi-
leged as to
informa-
tion re-
ceived by
him extra-
profession-
ally.

§ 502. Privilege in this relation does not extend to information a lawyer has received from others than his client, though his client may have given the same information.⁷ It has also been held that privilege does not protect statements made by client to counsel for the purpose of obtaining information as to matters of fact, as distinguished from matters of law;⁸ or statements made

Baddeley, 1 Phill. 476; Hemenway v. Smith, 28 Vt. 701; Carnes v. Platt, 36 N. Y. Sup. Ct. 360; S. C., 15 Abb. Pr. N. S. 337; Bigler v. Regher, 43 Ind. 112; Duttenhofer v. State, 34 Oh. St. 91.

¹ Woburn v. Henshaw, 101 Mass. 193.

² Duttenhofer v. State, 34 Oh. St. 91; Bigler v. Regher, 43 Ind. 112; Barker v. Kuhn, 38 Iowa, 395; Bobo v. Bryson, 21 Ark. 387. See supra, § 479.

³ Hare on Discovery (2d ed.), 167; Walsh v. Trevanion, 15 Sim. 577; Hunter v. Capron, 5 Beav. 98; Dartmouth v. Holdsworth, 10 Sim. 476; Thomas v. Rawlings, 27 Beav. 140. See, however, People v. Atkinson, 40

Cal. 284, where it was said that the court would interpose of its own motion; and see supra, §§ 281-83.

⁴ Hughes v. Garnons, 6 Beav. 352.

⁵ Hamilton v. People, 29 Mich. 183. See cases cited supra, § 498; Montgomery v. Pickering, 116 Mass. 231.

⁶ See cases cited Whart. on Ev. § 587.

⁷ Whart. on Ev. § 588. See People v. Atkinson, 40 Cal. 284.

⁸ Bramwell v. Lucas, 2 B. & C. 743; Desborough v. Rawlins, 3 Myl. & C. 515; Sawyer v. Birchmore, 3 Myl. & K. 572; Allen v. Harrison, 30 Vt. 219. Infra, § 503.

In R. v. Farley, 1 Den. C. C. 197, when the wife of a prisoner took a forged will to an attorney at the pris-

to the counsel in the presence of third parties, such parties not being concerned in a confidential consultation;¹ or statements made to counsel in order to induce him to believe that the cause is one he can undertake without breach of duty to another client.²

§ 503. Information belonging to ordinary, as distinguished from professional intercourse, is not within professional privilege. The topic must be within the peculiar scope of a lawyer's profession.³ A lawyer, for instance, may be required to identify his client;⁴ to prove his client's handwriting;⁵ and to divulge statements made to him by his client when such statements are simply casual observations, having nothing to do with any legal question as to which the lawyer is consulted,⁶ or are collateral to such question.⁷ It is now said, however, that he will not be compelled to disclose his client's address,⁸ unless the client be a ward of court,⁹ or in bankruptcy.¹⁰ But the condition of the client's mind, when he consults his lawyer, when such condition would be patent to all

Information not in the scope of professional duty not privileged.

oner's request, and asked if he could advance her husband some money upon the mortgage of property mentioned in the will; it was held that this was not a privileged communication. So where a forged will was put into an attorney's hands not in professional confidence, but that by finding it among the title deeds of the deceased, which the prisoner sent with the will, he might be disposed to act upon it; it was held by all the judges, that the communication was not privileged. *R. v. Jones*, 1 Den. C. C. R. 166. *Roscoe's Cr. Ev.* 8th ed. 153.

¹ *Goddard v. Gardner*, 28 Conn. 172. See *Hoy v. Morris*, 13 Gray, 519.

² *Heaton v. Findlay*, 12 Penn. St. 304.

³ *Carpmael v. Powis*, 1 Ph. 687; *Bramwell v. Lucas*, 2 B. & C. 745; *Brown v. Foster*, 1 H. & N. 736; *R. v. Levenson*, 11 Cox C. C. 152; *Goodall v. Little*, 20 L. J. Ch. 132; 1 Sim. N. S. 135; *Wheatley v. Williams*, 1

M. & W. 533; *Desborough v. Rawlins*, 3 Myl. & Craig, 515; *Jones v. Goodrich*, 5 Mood. P. C. 16; *Smith v. Daniell*, L. R. 18 Eq. 649; *Clark v. Richards*, 3 E. D. Smith, 89; *Pierson v. Steortz*, *Morris (Iowa)*, 136; *State v. Mewherter*, 46 Iowa, 88.

⁴ *Studdy v. Sanders*, 2 D. & R. 347; *Doe v. Andrews*, 2 Cowp. 846.

⁵ *Hurd v. Moring*, 1 C. & P. 372; *Johnson v. Daverne*, 19 Johns. 134; *Brown v. Jewett*, 120 Mass. 215; and see *Ramsbotham v. Senior*, L. R. 8 Eq. 575; *Campbell, ex parte*, L. R. 5 Ch. Ap. 703.

⁶ *Gillard v. Bates*, 6 M. & W. 547; *Annesley v. Anglesea*, 11 How. St. Tr. 1220.

⁷ *State v. Mewherter*, 46 Iowa, 88.

⁸ *Heath v. Creelock*, L. R. 15 Eq. 257; though see *Studdy v. Sanders*, 2 D. & R. 347.

⁹ *Ramsbotham v. Senior*, L. R. 8 Eq. 575.

¹⁰ *Cathcart, in re*, L. R. 5 Ch. 703.

observers, is not privileged;¹ nor is the question whether the lawyer was retained by the client, and in what capacity.²

§ 504. The privilege does not shield parties seeking for information or advice as to prospective infractions of law. Communications of an intended offence of this class counsel are bound to disclose,³ and so as to threats made in the attorney's office to take the life of a man subsequently murdered by the client.⁴ The protection of privilege has also been withheld from communications to a lawyer for the purpose of raising money on forged securities.⁵ It is scarcely necessary to add that when the lawyer connives at the illegal purpose he so far loses his professional character as to preclude him personally from claiming any privilege. "Where

¹ *Daniel v. Daniel*, 39 Penn. St. 191.

² *Beckwith v. Benner*, 6 C. & P. 681; *Heaton v. Findlay*, 12 Penn. St. 304; though see *contra*, as to nature of relationship. *Chirac v. Reinicker*, 11 Wheat. 280; S. C., 2 Pet. 613.

³ *R. v. Avery*, 8 C. & P. 596; *R. v. Farley*, 2 C. & K. 313; S. C., 1 Den. C. C. 197; *R. v. Brewer*, 6 C. & P. 863; *Follett v. Jefferyes*, 1 Sim. N. S. 17; *Charlton v. Coombes*, 4 Giff. 372; *Shore v. Bedford*, 5 Man. & Gr. 271; *People v. Blakeley*, 4 Parker C. R. 176; *Bank v. Mersereau*, 3 Barb. Ch. 598; *People v. Sheriff*, 29 Barb. 622; *Graham v. People*, 63 Barb. 483; *People v. Mahon*, 1 Utah, 205.

In *Cole's case*, Cent. L. J. Aug. 1, 1879; S. C., 8 Weekly Notes, 114, Judge Butler said in the U. S. Dist. Ct. in Philadelphia: "But suppose a client had devised, with the assistance of counsel, a scheme to obstruct the administration of justice, would the communications be privileged? The authorities say not."

⁴ *State v. Mewherter*, 46 Iowa, 88.

⁵ *R. v. Farley*, *ut supra*.

"There is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or

a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist." Lord Hatherley, in the case of *Garteside v. Outram*, 26 L. J. Ch. 113, 114, citing *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139; *Mornington v. Mornington*, 2 John. & H. 697, 703; *Gore v. Bowser*, 5 D. G. & Sm. 30; *Goodman v. Holroyd*, 15 C. B. (N. S.) 839; *Blight v. Goodliffe*, 18 C. B. (N. S.) 757; *Chartered Bank of India v. Rich*, 32 L. J. Q. B. 300, 306; *R. v. Jones*, 1 Den. C. C. 166; *R. v. Farley*, 1 Den. C. C. 197.

The court will look at the circumstances of each case. *Bassford v. Blakesley*, 6 Beav. 131. See also *Doe d. Shellard v. Harris*, 5 C. & P. 594; *Levy v. Pope*, M. & M. 410.

Where there is fraud, there is no privilege. *Reynell v. Sprye*, 10 Beav. 51; *Follett v. Jefferyes*, 1 Sim. N. S. 1. The topic is fully discussed in *Hare on Disc.* (2d ed.) 163. See also *People v. Blakely*, 4 Park. C. R. 176.

The points in the text are sustained in *Taylor's Ev.* 7th ed. § 912.

a solicitor is party to a fraud, no privilege attaches to the communications with him on the subject, because the contriving of a fraud is no part of his duty as a solicitor.”¹ A lawyer, however, cannot be asked, and certainly cannot be compelled to answer, whether his advice to his client did not involve an illegal purpose.² The protection is said to extend to consultations as to acts not *malum in se*.³

§ 505. “The communications,” says Mr. Hare, in his work on Discovery,⁴ “between a party, or his legal adviser, and witnesses are also privileged. There is, in those cases, the same necessity for protection; otherwise, as Lord Langdale remarked, it would be impossible for a party to write a letter for the purpose of obtaining information on the subject of a suit, without incurring the liability of having the materials of his defence disclosed to the adverse party.”⁵ Communications between the parties, with regard to the preparation of evidence, are in like manner privileged.⁶

§ 506. Telegraphic agents and operators (if there be no statute to the contrary) are compelled to produce in court the originals of telegrams, or, if such originals be lost, to give secondary evidence of their contents.⁷ A statute merely prescribing that telegrams shall not be disclosed

Communi-
cations be-
tween
party and
witnesses
privileged.

Tele-
graphic
communi-
cations not
privileged.

¹ Turner, V. C., in *Russell v. Jackson*, 9 Hare, 392; *Brown v. Foster*, 1 H. & S. 236, cited *supra*, § 496.

² *Doe v. Harris*, 5 C. & P. 594.

³ *Bank v. Mersereau*, 3 Barb. Ch. 528.

⁴ Hare on Disc. 2d ed. 1876, 151.

⁵ *Preston v. Carr*, 1 Y. & J. 175; *Ross v. Gibbs*, L. R. 8 Eq. 522; *Curling v. Perring*, 2 Myl. & K. 380; *Storey v. Lennox*, 1 Myl. & C. 525; *Llewellyn v. Baddeley*, 1 Hare, 527; *Lafone v. Falkland Islands Co.* 4 Kay & J. 34; *Gandee v. Stansfield*, 4 De G. & J. 1; *Daw v. Eley*, 2 Hem. & M. 725; *Phillips v. Routh*, L. R. 7 C. P. 289; *Wilson v. R. R.* L. R. 14 Eq. 477; *Hamilton v. Nott*, L. R. 16 Eq. 112.

⁶ Hare on Disc. 152, citing *Allan v.*

Royden, 43 L. J. (C. P.) 206; though see *Rayner v. Ritson*, 6 B. & S. 888; *Colman v. Truman*, 3 Hurl. & N. 871.

⁷ *Ince's case*, 24 L. T. (N. S.) 421; *State v. Litchfield*, 58 Me. 267; *Com. v. Jeffries*, 7 Allen, 548; *Henisler v. Freedman*, 2 Parsons Sel. Cas. 274; *Nat. Bk. v. Nat. Bk.* 7 W. Va. 544; *Brown, ex parte*, Ct. App. Mo. 1879; *Cent. L. J.* May 9, 1879. And see *Whart. on Ev.* § 617. See *contra*, *Cooley, J., Const. Lim.* 306-7; *Am. Law Reg.* Feb. 1879, cited *Whart. on Ev.* (2d ed.) § 595.

“The main question presented for our determination is, whether a telegraphic operator is bound to testify to the contents of a telegraphic message. The case finds the message material

does not apply to cases where they are called for by process of law.¹ Not only is such production required by the rule which permits a party to compel the production in court of all papers essential to enable him to make out a litigated case, but unless this right be maintained in this special instance, parties not looked upon with favor by the officials of telegraphic corporations might be exposed to ruin by the disclosure of telegrams prejudicing them and the suppression of telegrams operating to

to the issue. A verbal message, communicated to the prisoner, would be admissible, and the party communicating it would be compelled to state it. So a written message, or its contents, after due notice to produce the original, and a failure of its production by the party notified, would be received in evidence. The mode of transmission to the person delivering the message, whether by telegraph or otherwise, has nothing to do with the matter. The important inquiry relates to its materiality.

“Nor can telegraphic communications be deemed any more confidential than any other communications. Telegraphic communications are not to be protected to aid the robber or assassin in the consummation of their felonies, or to facilitate their escape after the crime has been committed. No communication should be excluded, no individual should be exempt from inquiry, when the communication, or the answer to the inquiry, would be of importance in the conviction of crime or the acquittal of innocence, except when such exclusion is required by some grave principle of public policy. The honest man asks for no confidential communications, for the withholding the same cannot benefit him. The criminal has no right to demand exclusion of evidence because it would establish his guilt.

“The telegraphic companies cannot rightfully claim that the messages

of rogues and criminals, which they may innocently or ignorantly transmit, should be withheld, whenever the cause of justice renders their production necessary. They cannot wish their servants should, however innocently, coöperate in the commission of crime, and decline to coöperate in its detection and punishment, and thus become its accomplices. The interests of the public demand that resort should be had to all available testimony, which may lead to the detection and punishment of crime, and to the protection of innocence. The telegraph operator, as such, can claim no exemption from interrogation. Like other witnesses, he is bound to answer all inquiries material to the issue.” *Appleton, C. J., State v. Litchfield*, 58 Me. 269. See also *U. S. v. Babcock*, 3 Dillon, 566, where the court granted a writ requiring a telegraph company to bring into court all the copies of telegrams received at certain offices by and from persons named. In this case, however, materiality was assumed, and no question of privilege was raised.

To the same effect is the action of the House Judiciary Committee in *Barnes's case*, 20 Alb. L. J. 110.

¹ *Brown, ex parte*, Ct. Ap. Mo. 1879; Cent. L. J. May 9, 1879. The statutes are analyzed and commented on by Mr. Hitchcock, in the *Southern Law Review* for 1879.

their advantage. It may be said, we have no right to presume such perfidy. We have not; yet, as a matter of fact, it has been found impossible, in times of high political or monetary excitement, to seal apertures through so many of which there is a leakage; and a wire may be tapped where it might be difficult to tap an operator. This abuse cannot be absolutely prevented; but it may be corrected by giving each party equal rights, and by saying to such corporations, "You cannot plead your immunity so as to injure those whom you are unable or unwilling to protect."

But while we must hold that a telegraph corporation is bound to produce whatever papers may be needed to subserve the case of a litigant, the subpoena, to justify an attachment, should designate the specific paper required. A call for a general correspondence, so that an inquirer may pick out what he wants, and get possession in this way of the private affairs of others, should not be sustained.¹

¹ Supra, § 345. A wider operation of the writ was allowed in Barnes's case by a committee of the House of Representatives, in 1877 (Cong. Rec. vol. v. pt. i. p. 604), and in Brown, *ex parte*, supra. The distinction in the text is vindicated with much strength by Mr. Hitchcock, in the excellent article already noticed. South. Law Rev. Oct. 1879; published also in pamphlet form, St. Louis, 1879. The conclusions stated by Mr. Hitchcock are as follows:—

"I. Telegraphic communications, however confidential, do not, *as such*, constitute a class of privileged communications. Remaining in the custody of the telegraph company, they are subject to compulsory production for use in evidence, under process lawfully issued whenever those conditions are fulfilled, in respect of the case in hand, which must exist in any case to render lawful the exercise of such a power.

"II. The right of a court to compel by *subpoena duces tecum* the production in evidence by third parties of private writings, described with cer-

tainty, and first shown to be at least *prima facie* relevant and competent, does not include any right to order search for, or compulsory production of, papers not thus brought within the lawful power of the court; and the compulsory search for and enforced production by third parties of such papers, in the absence of such certainty and proof, is an "unreasonable" and unlawful search and seizure, within the meaning of the Constitution.

"III. The exceptional features of the telegraph service, including the virtual necessity for its use by the public, and the unavoidable accumulation of private messages in telegraph offices, give rise to exceptional danger of abusing even the lawful power of the courts, and devolve upon them the duty of exceptional precautions in its exercise. And in view of the apparent tendency of the decisions, this judicial duty should be defined and enforced without delay by appropriate legislation.

"IV. The telegraph service of the country, as an indispensable agency of

§ 507. Whether a priest is privileged as to the confidences of the confessional has been elsewhere discussed.¹ The difficulties attending the question are undoubtedly great. To establish privilege in such cases we must concede privilege to all religious confidences. But to this the objections are serious. (1.) What are *religious* confidences? Are not all confidences sanctioned by duty more or less religious?²

Priests not privileged as to confessional at common law.

commercial intercourse among the States, has been held by the Supreme Court to be clearly within the grant of congressional powers. Congress should exercise that power in this regard, not necessarily by assuming the service of the telegraph, — a completely distinct question, not involved in the present discussion, — but by such uniform regulations as will protect those who use it, not only against unauthorized disclosures by telegraph employees, but also from interference by state legislation, or by any court, with the lawful right of free communion; and from 'unreasonable searches or seizures' of such communications under color of civil or criminal process.

"V. Such regulations should prescribe, as precedent to the exercise by any court of the power in question, conditions which shall effectively distinguish the lawful right to compel the production of relevant and competent evidence from the inquisitorial and oppressive power of searching among, or compelling the production of, private papers of third parties, to find out what evidence they may contain. Among these should be included: —

"a. An affidavit of the party applying for such writ, at least upon information and belief, of the existence, the sufficiently certain description, and the alleged or supposed contents of the dispatches called for, showing their relevancy in the cause.

"b. Reasonable notice of such ap-

plication, so far as practicable, to any third person, sender, or receiver of such telegram, and reasonable opportunity to show cause against the same.

"c. In addition to the criminal penalty for false swearing in any such affidavit, a right of action for exemplary damages against any person wilfully or maliciously procuring, by means of such process, the unnecessary disclosure of any private message.

"VI. Effectual provision should also be made against the like abuse of power by any legislative body or committee thereof. The constitutional right of such bodies to take and compel testimony touching facts, the knowledge of which is requisite to the fulfilment of their constitutional duties, is not denied, and was convincingly affirmed by the Supreme Court of Massachusetts in *Burnham v. Morrissey*, 14 Gray, 239; but it was also there held that such bodies are not the final judges of their own powers and privileges in cases involving the rights and liberty of the citizen, their action in that regard being subject to the review of the courts. The legislative recognition of the principles already discussed would doubtless go far, in future, to prevent the necessity for judicial interference in such cases."

¹ Whart. on Ev. § 507.

² See Mr. Livingston's argument, *Livingston's Works*, i. 467.

(2.) Can we, consistently with the Constitution of the United States, confer upon the confidences of members of religious communions distinctive privileges? Would statutes conferring such privileges be constitutional? (3.) Even supposing that it is proper and constitutional to confer such privileges on members of religious communions, can we either logically or constitutionally give a protection to one communion which we refuse to another, and if we admit all communions to this privilege will not this be admitting everybody? ¹

§ 508. By the common law of England, as accepted in the United States, the duty of testifying as to all communications received from others has been imposed not merely on ministers of religion generally, but on priests of the Roman Catholic Church, as to communications received in the confessional.² At the same time, prosecuting officers, as representing the State, properly shrink from calling upon priests to disclose confessions as evidence against parties on trial for crimes; and eminent judges have gone a great way in encouraging this reluctance. "I,

¹ In *Feital v. R. R.* 109 Mass. 398, it was held by the Supreme Court of Massachusetts that a person going on Sunday to a clairvoyant exhibition, where there was to be rope dancing, and an admission charged, was attending "religious services" so as to be within the exception of the statutes prohibiting travelling on Sunday unless for purposes of religious worship, or of necessity, or charity.

² *Wilson v. Rastall*, 4 T. R. 753; *Butler v. Moore*, M'Nally's Ev. 253; *Anon.* 2 Skin. 404; *Du Barree v. Livette*, Peake's Cas. 77; *R. v. Hay*, 2 F. & F. 4; *Com. v. Drake*, 15 Mass. 161; *Simon v. Gratz*, 2 Penn. R. 417; *State v. Bostick*, 4 Harr. (Del.) 564.

I have been referred by a learned friend to the following cases as conflicting with the conclusion of the text: *People v. Phillips*, Court of Gen. Ses. N. Y. 1813; *Phillips' Trial*, as approved by Chancellor Dessassaure, in *Fernandez v. Henderson*, 1 Carolina L. J. 213; *Swish's case*, 2 City Hall

Rec. 77; *Com. v. Cronin*, 1 Quart. L. Jour. 128. And see argument in *Whart. on Ev.* 2d ed. § 597.

That Protestant divines are not privileged see *Com. v. Drake*, 15 Mass. 161.

In England no such privilege is conceded as a right. The English ecclesiastical law invites the penitent to confess his sins, "for the unburdening of his conscience, and to receive spiritual consolation and ease of mind;" but the minister, to whom confession is made, is not excused from testifying in a court of justice, but merely enjoined, "under pain of irregularity," not to reveal what is confessed. *Const. & Can.* 1 J. 1 Can. cxiii.; 2 Gibs. Cod. p. 963. This has been construed to leave him liable to the prescriptions of the common law, which makes in this respect no distinction between clergyman and layman. *R. v. Gilham*, 1 Mood. C. C. 188.

for one," so Best, J., is reported to have said, "will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I will receive them in evidence."¹ So it was declared by Alderson, B., in a case where it appeared that a chaplain in a work-house had frequent conversations in his pastoral capacity with the inmates, that it was better that the chaplain should not be called as a witness to prove confessions so received by him.² The same sentiment has led to a statute in New York, providing that "no minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rule or practice of such denomination."³ Similar statutes have been enacted in other States, though how far such statutes are constitutional is, as has been noticed, a matter of doubt. Under these statutes, however, a communication, to be privileged, must be made in the course of religious discipline.⁴

¹ *Broad v. Pitt*, 3 C. & P. 519.

² *R. v. Griffin*, 6 Cox C. C. 219.

³ 2 Rev. Stat. 406, § 72.

⁴ *People v. Gates*, 13 Wend. 323; *Gillooley v. State*, 58 Ind. 182. See 2 Rogers's Rec. 79. See also Forsyth's History of Lawyers, 254; Sampson's Roman Catholic Question in America (Pamphlet); Joy on Confes. 49-58; and closing remarks of Field, J., in *Totten v. U. S.* 92 U. S. 105.

R. v. Hay, 2 F. & F. 4, above noticed, led to the following discussion in the House of Commons:—

"Mr. Bowyer wished to ask a question regarding the committal of a Roman Catholic priest at Durham.

"It appeared that the reverend gentleman had received a watch, in confession, in order that he might make a restitution of it to the owner, and had subsequently handed it to a policeman. Upon the trial of a party for stealing the watch, the Roman Catholic priest was asked by Mr. Justice Hill from whom he received the watch. The reverend gentleman re-

fused to answer the question, and was thereupon committed for contempt of court. Mr. Bowyer thought the case a mistaken, and very oppressive one, and that, by the old common law, the seal of confession constituted a privileged communication. He wished to ask if the reverend gentleman had been set at liberty, and if not, whether the government would take steps that he might be immediately released.

"Sir G. C. Lewis said his information differed from that of the honorable gentleman with regard to the law of England. He believed it would be found that while any communication between a counsel, solicitor, or attorney, with a client, respecting a suit in which the latter was engaged, was a privileged communication; with regard to a clergyman of any denomination, or a physician, no such privilege existed. He, therefore, contended the learned judge had not gone beyond the law. In fact, the question was pressed by counsel, and the court had no option but to commit the witness

§ 509. The privilege of inviolability is necessarily extended to the consultations of judges; though they may be examined, as we have seen, as to what took place before them on trial, in order to identify the case, or prove the testimony of a witness.¹ The same privilege extends to justices of the peace, with a like liability to be examined as to the facts of the trial.² A presiding judge cannot be sworn as a witness in a case before him.³ But where the decision of a judge of probate is appealed from, on the ground that he was interested in the estate which his decision settled, it has been held in Massachusetts that he is a competent witness on appeal to prove that he was not interested.⁴

Judges
cannot be
examined
as to their
delibera-
tions.

under the circumstances. He believed, however, that the reverend gentleman only remained in custody a few minutes, and had been discharged in the course of the day.

“Mr. Ingham defended the course pursued by the learned judge, and fully agreed with the right honorable gentleman, the home secretary, in his interpretation of the law.

“Sir F. Kelly also corroborated the statement as made by the right honorable gentleman.”

See, in reply to this, an interesting work by Mr. Baddely, on the Privilege of Religious Confession, London, 1865. And see Stephen's Ev. 171, and Best's Ev. §§ 583-4, where the inference is that the privilege, if it exists at all, belongs to all clergymen.

Ecclesiastics are by the Roman common law not required to testify as to what was communicated to them under the seal of the confessional. To this rule, however, the following exceptions have been made:—

(1.) When the disclosure is required by the policy of the State;

(2.) When an innocent person is charged with a crime, conviction for which he can only escape by a disclosure of facts given in the confessional;

(3.) When the clergyman receiving

the confession is authorized to testify by the person confessing;

(4.) When disclosure is necessary in order to prevent an impending crime. See Weiske, Rechtslexicon, xv. 259.

¹ Hare on Disc. (2d ed. 1876) 182; Jackson v. Humphrey, 1 Johns. 498; Heyward, in re, 1 Sandf. 701. See Welcome v. Batchelder, 23 Me. 85; and see Whart. on Ev. §§ 180, 785, 986. In R. v. Gazard, 8 C. & P. 595, it was doubted whether, even as to the facts of a case before him, a judge could be examined.

² Highberger v. Stiffler, 21 Md. 338; Taylor v. Larkin, 12 Mo. 103.

³ People v. Miller, 2 Parker C. R. 197. See Morss v. Morss, 11 Barb. 510; McMillen v. Andrews, 10 Oh. St. 112; Ross v. Buhler, 2 Mart. (N. S.) 313.

⁴ Sigourney v. Sibley, 21 Pick. 101.

It has been ruled in England, that if a judge be sitting with others he may then be sworn, and give evidence. Trial of the Regicides, Kel. 12; 5 How. St. Tr. 1181, n. S. G. But in such case, the proper course seems to be for the judge who has thus become a witness to leave the bench, and take no further judicial part in the trial.

§ 510. It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury room ;¹ but it is now held that such disclosure, wherever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required.² This is the statutory rule

Mr. Taylor notices in this relation that on several occasions when trials have been instituted before the high court of parliament, peers, who have been examined as witnesses, have, nevertheless, taken part in the verdict subsequently pronounced. 7 How. St. Tr. 1384, 1458, 1552; 16 How. St. Tr. 1252, 1391. He argues, however, that these cases are not inconsistent with the law as above stated, since in trials before the House of Lords, the peers must be regarded at least as much in the light of jurors as of judges; and, as will hereafter be seen, a jurymen is not disqualified from acting, simply by being called as a witness. *Infra*, § 511; Taylor's Ev. § 1244.

¹ *Imlay v. Rogers*, 2 Halst. 347; *State v. Baker*, 20 Mo. 338.

² Whart. Cr. Pl. & Pr. § 378; *Sykes v. Dunbar*, 2 Selw. N. P. 1059; *U. S. v. Charles*, 2 Cranch C. C. 76; *State v. Wood*, 53 N. H. 484; *Com. v. Hill*, 11 Cush. 137; *Com. v. Mead*, 12 Gray, 167; *State v. Fasset*, 16 Conn. 457; *People v. Hulburt*, 4 Denio, 133; *Huidekoper v. Cotton*, 3 Watts, 56; *Thomas v. Com.* 2 Rob. (Va.), 795; *Little v. Com.* 25 Grat. 921; *Turk v. State*, 2 Ham. pt. ii. 240; *State v. Boyd*, 2 Hill S. C. 288. See *Tindle v. Nichols*, 20 Mo. 326; *State v. Offutt*, 4 Blackf. 355; *Burnham v. Hatfield*, 5 Blackf. 21; *Perkins v. State*, 4 Ind. 222; *Granger v. Warrington*, 3 Gilman, 299; *Burdick v. Hunt*, 43 Ind. 384; *State v. Broughton*, 7 Ired. 96; *Sands v. Robison*, 20 Miss. 704; *Rocco v. State*, 37 Miss. 357; *People*

v. Young, 31 Cal. 564; *White v. Fox*, 1 Bibb, 369; *Crocker v. State*, 1 Meigs, 127; *Beam v. Link*, 27 Mo. 261. *Contra*, see *Imlay v. Rogers*, 2 Halst. 347.

“But it is urged that the secrets of the grand jury must be protected — that the oath of the grand juror prohibits their utterance. The juror is sworn, the state's counsel, his fellows, and his own, to keep secret. But the oath of the grand juror does not prohibit his testifying what was done before the grand jury when the evidence is required for the purposes of public justice or the establishment of private rights. *Burnham v. Hatfield*, 5 Blackf. 21. ‘It seems to us,’ observes Ruffin, C. J., in *The State v. Broughton*, 7 Iredell, 96, ‘that the witness (who testifies before the grand jury) has no privilege to have his testimony treated as a confidential communication, but that he ought to be considered as deposing under all the obligations of an oath in judicial proceedings, and, therefore, that the oath of the grand juror is no legal or moral impediment to his solemn examination under the direction of a court, as to evidence before him, whenever it becomes material to the administration of justice.’

“To the same effect was the decision of the Supreme Court of Indiana in *Perkins v. State*, 4 Ind. 222. In *Com. v. Hill*, 11 Cush. 137, a member of the grand jury which found an indictment was held to be a competent witness on trial to prove that a certain person did not testify before

in Massachusetts and New York. A grand juror's testimony, however, will not be received to impeach the finding of his fellows, or even to show what was the vote on the finding.¹ So a petit juror is not ordinarily permitted to disclose the deliberations of the jury when consulting in their private room.² He is, however, competent to testify as to the issues actually passed on by the jury of which he was a member, when this is material on a subsequent trial.³

the grand jury. In *Com. v. Mead*, 12 Gray, 167, it was held that the defendant, for the purpose of impeaching a witness for the Commonwealth, on the trial of an indictment, might prove that he testified differently before the grand jury. So, if to impeach a witness evidence is offered of statements made by him before the grand jury, he may testify in rebuttal what those statements were. *Way v. Butterworth*, 106 Mass. 75. When a witness testifies differently in the trial before the petit jury from what he did before the grand jury, the grand jurors may be called to contradict him, whether his testimony is favorable or adverse to the prisoner. So in all cases, when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses. Such seems the result of the most carefully considered decisions in this country.

"In *Low's case*, 4 Maine, 440, it was held that grand jurors might be examined as witnesses in court, to the question whether twelve of the panel concurred or not in the finding of a bill of indictment. If the counsel of the grand jurors is to be kept secret at all events, the votes of the grand jurors are certainly as much a matter of secrecy as anything done or testified to before them. The action of a grand juror is more especially a matter of his own counsel than any statement of any one else before his body.

The assertion, that less than twelve concurred in an indictment, involves necessarily the assertion of who did and of who did not so concur." *Appleton, C. J., State v. Benner*, 64 Me. 284.

¹ *Whart. Cr. Pl. & Pr.* § 379; *R. v. Marsh*, 6 Ad. & El. 236; *McLellan v. Richardson*, 1 Shepl. 82; *State v. Fasset*, 16 Conn. 457; *People v. Hulburt*, 4 Denio, 133; *Huidekoper v. Cotton*, 3 Watts, 56; *State v. Beebe*, 17 Minn. 241; *State v. Balt. R. R.* 15 W. Va. 363; *State v. McLeod*, 1 Hawks, 344; *Simms v. State*, 60 Ga. 145; *State v. Baker*, 20 Mo. 338; *State v. Oxford*, 30 Tex. 428.

² *Whart. Cr. Pl. & Pr.* § 847.

³ *Haak v. Breidenbach*, 3 S. & R. 204; *Leonard v. Leonard*, 1 W. & S. 342; *Follansbee v. Walker*, 74 Penn. St. 306. *Infra*, § 593.

"It is equally clear that the jurors were competent witnesses. In *Haak v. Breidenbach*, 3 S. & R. 204, and *Leonard v. Leonard*, 1 W. & S. 342, the parol evidence was given by jurors, and in the latter case, under a special objection and exception; yet the judgment was reversed for the rejection of the evidence. There is no principle of law or rule of policy which in such a case ought to exclude them. It is entirely different from where they are called to impeach a verdict on the ground of their own misbehavior or that of their fellows. *Cluggage v. Swan*, 4 Binney, 150,

A juror possessed of knowledge material to the case must be sworn as a witness.

§ 511. As is elsewhere incidentally noticed,¹ a juror on trial, who has knowledge of any material facts, must give notice, so that he can be sworn, examined, and cross-examined. He cannot be permitted to give evidence to his fellow jurors without being so sworn.²

Prosecuting attorneys privileged as to confidential matters.

§ 512. A prosecuting attorney, it has been held, is privileged from disclosing the proceedings of the grand jury,³ though not from examination as to the testimony of witnesses, or as to other matters to which a grand juror could testify.⁴ Communications made to a prosecuting attorney relative to suspected criminals, or to the operations of a detective police, are privileged, and are not to be divulged by the attorney without the consent of the person making the communication.⁵

State secrets privileged.

§ 513. A crown witness, in a political prosecution, cannot be asked, so it has been held in England, as to the quarters from which his information was received; and this sanctity was extended to revenue cases.⁶ Even as late as O'Connell's case,⁷ it was held that state policy precluded an investigation into the channels through which information of breaches of the law reached the prosecuting authorities. To this extent the protection may be granted, limiting it strictly to cases of public as distinguished from private necessity.⁸ For the

though even that has been since questioned. *Ritchie v. Holbrooke*, 7 S. & R. 458." *Sharswood, J., Follansbee v. Walker*, 74 Penn. St. 309.

¹ Whart. Cr. Pl. & Pr. § 833.

² Taylor's Ev. § 1244; *R. v. Rosser*, 7 C. & P. 648, per Parke, B.; *Manley v. Shaw*, C. & Marsh. 361, per Tindal, C. J.; *Bennet v. Hartford*, Sty. 233; *Fitz-James v. Moys*, 1 Sid. 133; Andr. 231, arg.; *R. v. Heath*, 18 How. St. Tr. 123; *R. v. Sutton*, 4 M. & S. 532, 541, 542; 6 How. St. Tr. 1012, n.; *Dunbar v. Parks*, 2 Tyler, 217; *State v. Powell*, 2 Halst. 244; *Howser v. Com.* 51 Penn. St. 332; *McKain v. Love*, 2 Hill (S. C.), 506; *Sam v. State*, 1 Swan (Tenn.), 61; *Anschicks v. State*, 6 Tex. Ap. 524.

³ *McLellan v. Richardson*, 13 Me. 82; *Clark v. Field*, 12 Vt. 485; but see *White v. Fox*, 1 Bibb, 369; Whart. Cr. Pl. & Pr. § 380.

⁴ Ibid.; *Knott v. Sargent*, 125 Mass. 95; *State v. Van Buskirk*, 59 Ind. 384.

⁵ *Oliver v. Pate*, 43 Ind. 132. See § 513.

⁶ *R. v. Watson*, 32 How. St. Tr. 100; *R. v. Hardy*, 24 How. St. Tr. 753; *Horne v. Bentinck*, 2 B. & B. 130, 162. *Infra*, § 515.

⁷ Arm. & T. 178.

⁸ *R. v. Richardson*, 3 F. & F. 693; *Atty. Gen. v. Briant*, 15 M. & W. 181; *U. S. v. Moses*, 4 Wash. C. C. 726; *State v. Soper*, 16 Me. 295. See 1 Burr's Trial, 186; *Washington v.*

same reason the executive of a State, and his cabinet officers, are entitled, in exercise of their discretion, to determine how far they will produce papers, or answer questions as to public affairs, in a judicial inquiry.¹ In conformity with this view, it has been held that communications in official correspondence relating to matters of state cannot be produced as evidence in an action against a person holding an office, for an injury charged to have been done by him in exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of state policy.² And where a minister of state, subpoenaed to produce public documents, objects to do so on the ground that their publication would be injurious to the public interest, the court ought not to compel their publication;³ and the question, whether the production of such a document would be injurious to the public service, must be determined by the head of the department having the custody of the paper, and not by the judge.⁴ This privilege however, has been held to be personal to the head of a depart-

Scribner, 109 Mass. 487; *Gray v. Pentland*, 2 S. & R. 23; *Oliver v. Pate*, 43 Ind. 132. *Infra*, § 515.

¹ *Beatstone v. Skene*, 5 H. & N. 838; *Anderson v. Hamilton*, 2 B. & B. 156; *Burr's Trial*, Westcott's ed. vol. iii. p. 37; *Hopkins & Earle's ed.* vol. ii. p. 536; *Gray v. Pentland*, 2 S. & R. 23; *Yoter v. Sanno*, 6 Watts, 164; *Hartranft's App.* 85 Penn. St. 433; *Cooper's case*, Whart. St. Tr. 662; *Marbury v. Madison*, 1 Cranch, 144; *Thompson v. R. R.* 22 N. J. Eq. 111.

As to privileges of senators of the United States in respect to their consultations see *Law v. Scott*, 5 H. & J. 438. In England, members of parliament are privileged from examination as to what took place in parliament. *Chubb v. Salomons*, 3 C. & K. 75. See *Sykes v. Dunbar*, 2 Selw. N. P. 1059; 4 Bl. Comm. 126; note by Mr. Christian of a case at York.

³ *Anderson v. Hamilton*, 2 B. & B. 156, n. "Lord Campbell, C. J., once

held that a witness cannot refuse to produce a letter which he holds from a secretary of state, to whom it has been addressed in his public character, and who forbids its production." *Powell's Evidence*, 4th ed. 135. At the same time it must be remembered, that where a document is privileged from production on the grounds of public policy, secondary evidence of its contents is inadmissible. *Home v. Bentinck*, 2 B. & B. 130.

⁴ *Beatstone v. Skene*, 5 H. & N. 838. See *Dickson v. Wilton*, 1 F. & F. 425, where Lord Campbell, following *Beatstone v. Skene*, 5 H. & N. 838, intimated that where a head of a department should send papers called for, the judge might examine the papers himself, and determine whether they are such as public policy excludes.

⁴ *Ibid.*, per Pollock, C. B. 5 H. & N. 853.

ment, and cannot be claimed by a subordinate ;¹ though in a suit against an admiral in the royal navy to recover damages for a collision caused by his flag-ship, Sir R. Phillimore refused the plaintiff permission to inspect reports of the collision made by the admiral to the lords of the admiralty, the secretary to the admiralty having made an affidavit that their production would be prejudicial to the public service.²

§ 514. Privilege, also, attaches to the proceedings of legislatures, whether federal or state, to such an extent as to protect witnesses (whether reporters or members) from questions as to debates and votes in either house of the legislature, unless the consent of the house be first given.³ And it was held by Lord Ellenborough,⁴ that while a member of parliament or the speaker may be called on to give evidence of the fact of a member of parliament having taken part or spoken in a particular debate, he cannot be asked what was then delivered in the course of the debate. It has also been held that communications between a governor of a province and his attorney general are privileged.⁵ Mere volunteer private communications to the executive are not so privileged.⁶

§ 515. "It is perfectly right," so it is stated by Eyre, C. J.,⁷ "that all opportunities should be given to discuss the truth of the evidence given against a prisoner ; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not be unnecessarily disclosed ; if it can be made to appear that it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it ; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in the present case." It has

¹ Dickson v. Lord Wilton, 1 F. & F. 424.

² The Bellerophon, 23 W. R. 248; 41 L. J. Adm. 5.

³ Plunkett v. Cobbett, 5 Esp. 136; S. C., 29 How. St. Tr. 71; Chubb v. Salomons, 3 C. & K. 75.

⁴ Plunkett v. Cobbett, 5 Esp. 136.

⁵ Wyatt v. Gore, Holt, 299. This rule was discussed in the Rajah of Coorg v. East India Co. 29 Beav. 350.

⁶ Blake v. Pilford, 1 M. & Rob. 198.

⁷ R. v. Hardy, 24 How. St. Tr. 808.

also been held that a police officer who has arrested a prisoner will not be bound to disclose the name of the person from whom he received information leading to the arrest.¹ On the other hand, on an indictment for poisoning, Cockburn, C. J., when a police officer declined to answer from whom information concerning certain poison was obtained, ordered the answer to be given, such answer being material.² The distinction is materiality. When such information is material to the issue it cannot be withheld. But when it is immaterial, the courts will not compel its disclosure.³ This immunity, however, extends only to official counsels. "A witness for the prosecution in a trial for riot may be compelled to state, on cross-examination, whether he is a member of a secret society organized to suppress a sect to which the defendant belongs."⁴

§ 516. A medical attendant is ordinarily without privilege even as to communications confidentially made to him by his patient.⁵ In the United States, however, statutes, in several jurisdictions, have been passed conferring this immunity,⁶ which statutes virtually prohibit physicians from disclosing information they derive professionally from their relations to their patient.⁷ The privilege of the stat-

Medical attendants not ordinarily privileged.

¹ U. S. v. Moses, 4 Wash. C. C. 726. See also State v. Soper, 16 Me. 295, and cases cited to § 513.

² R. v. Richardson, 3 F. & F. 693.

³ In a Massachusetts case, on the trial of an indictment for murder, to which the defence was insanity, an expert, called by the government, testified, on cross-examination, that he had given the counsel for the government a statement in writing of his opinion of the defendant's mental condition. The statement was on request handed to the defendant's counsel, who offered it in evidence, but was objected to by the attorney general, who stated that he would only allow it to be used to frame questions for cross-examination. The court refused to allow the statement to be read to the jury, and the defendant's counsel used it to cross-examine the

witness. It was held that the defendant had no ground of exception. Com. v. Pomeroy, 117 Mass. 144.

⁴ People v. Christie, 2 Parker C. R. 579.

⁵ Duchess of Kingston's case, 20 How. St. Tr. 613; Baker v. R. R. 3 C. P. 91; Mahoney v. Ins. Co. L. R. 6 C. P. 252.

See, as qualifying this, where a physician is employed by a railway company, in special cases, to inquire as to damages from accidents, Cossey v. R. R. L. R. 5 C. P. 146; Skinner v. R. R. L. R. 9 Ex. 298.

⁶ Whart. on Ev. § 606; Elwell's Malpractice, 320.

⁷ Edington v. Ins. Co. 5 Hun, 1; S. C., 67; N. Y. 185; Kendall v. Grey, 2 Hilt. (N. Y.) 300; People v. Stout, 3 Parker C. R. 670.

ute may be waived by the patient.¹ But it does not apply to testamentary inquiries;² nor does it operate so to preclude the examination of a physician as to the symptoms of a dying man, whom he professionally attended, and whom it was charged was poisoned.³ The privilege, also, does not cover consultations for criminal purposes.⁴ The privilege, it is held, continues after the patient's death.⁵ Whether, by the Roman common law, a physician is privileged as to matters confidentially imparted to him by a patient, has been much discussed; though the more recent tendency is to assert the inviolability of such secrets.⁶

§ 517. Excepting marriage, as is elsewhere shown, there is no domestic relationship recognized by the law as attaching inviolability to its conferences. Thus parents will be compelled to disclose confidential communications from their children;⁷ servants, those of masters;⁸ friends, those of friends.⁹

§ 518. The lips of parents are, as a rule, sealed on the question of sexual intercourse, so far as such testimony would go to assail the legitimacy of children. Whether there was such intercourse cannot be inquired of from either father or mother, either directly or by aid of circumstances from which the result could be inferred.¹⁰ This inviolability, however, is limited to cases where legitimacy is at issue, and does not preclude the examination, in cases of bastardy, of a married woman as to her adultery with a third person, when non-access with her husband is first proved.¹¹ And it

¹ *Johnson v. Johnson*, 14 Wend. 637.

² *Allen v. Public Administrator*, 1 Bradf. (N. Y.) 221.

³ *Pierson v. People*, 18 Hun, 247.

⁴ *Hewitt v. Prime*, 21 Wend. 79.

⁵ *Pierson v. People*, 18 Hun, 247; *Edington v. Ins. Co.* 67 N. Y. 185; *Grattan v. Ins. Co.* N. Y. App. 1880, 21 Alb. L. J. 607.

⁶ See a summary of the question in *Weiske's Rechtslexicon*, xv. 259, ff.

⁷ *Gilb. Ev.* 135.

⁸ *State v. Charity*, 2 Dev. 543; *State v. Isham*, 6 How. (Miss.) 35.

⁹ *Smith v. Daniell*, L. R. 18 Eq. 649.

¹⁰ *R. v. Luffe*, 8 East, 193; *Goodright v. Moss*, 2 Cowp. 594; *Wright v. Holgate*, 3 C. & K. 158; *R. v. Sourton*, 5 A. & E. 180; *R. v. Mansfield*, 1 Q. B. 444; *Anon. v. Anon.* 22 Beav. 481; 23 Beav. 273; *Rideout's Trusts*, L. R. 10 Eq. 41; *Chamberlain v. People*, 23 N. Y. 85; *Boykin v. Boykin*, 70 N. C. 262. See *supra*, § 390.

¹¹ *Cope v. Cope*, 1 M. & Rob. 272; *R. v. Reading*, Cas. temp. Hard. 79; *Com. v. Connelly*, 1 Browne (Pa.),

has been held competent for a widow, after her husband's death, to testify in support of her children's legitimacy.¹ But the mother of a child, begotten before marriage, though born after, is incompetent to prove that the child was not begotten by the husband.² The privilege thus established is not affected by the statutes removing disability from interest.³

284; *Com. v. Shepherd*, 6 Binn. 283;
State v. Pettaway, 3 Hawks, 623.

² *Dennison v. Page*, 29 Penn. St.
420.

¹ *Moseley v. Eakin*, 15 Rich. 324.

³ Whart. on Ev. § 608.

CHAPTER X.

DOCUMENTS.

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I. GENERAL CONSIDERATIONS.

§ 519. RECENT statutes having used the term “document” to designate the objects of forgery, as well as in some measure of larceny, it becomes our duty to inquire, in the first place, what the term “document” includes. And the answer is, that a document, in this sense, is an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term document applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be, as is elsewhere seen, on stone or gems,¹ or on wood (*e. g.* as is the case with tallies),² as well as on paper or parchment.³ “Document,” it will be therefore seen, is a term at once more comprehensive and more exact than “instrument in writing,” a term at one time generally used in the same relation. An “instrument in writing,” it might well be argued, does not include printed books; and it clearly does not include engravings on wood or stone. “Document,” however, includes not merely books, but any other thing on which is impressed a meaning which, emanating from one party, is calculated to affect the rights of another party.

Document is an instrument on which facts are recorded.

§ 520. Ink and paper, or ink and parchment, it has been said,

¹ Whart. on Ev. § 220.

² Whart. on Ev. § 519.

³ Kendall v. Field, 14 Me. 30; Rowland v. Burton, 2 Harring. 288.

are necessary to constitute a valid writing, when a writing, as such, is to be proved. But the mode of writing is immaterial, if the thing written be legible; and it has been frequently held that pencil writing, if identified, is sufficient to constitute a writing receivable in evidence.¹ In fact, some kinds of pencils leave marks more permanent and ineffaceable than some kinds of ink.²

§ 521. When one writing refers directly or indirectly to another for a fuller description, the admissibility of the first writing involves the admissibility of the second.³ Thus, the admission of a writing involves the admission of all self-dis-serving indorsements thereon made by the holder or with his permission.⁴ And whenever a document is offered against a party as containing an admission prejudicing him, he is entitled to have the context put in evidence in his defence.⁵

II. STATUTES: LEGISLATIVE JOURNALS: EXECUTIVE DOCUMENTS.

§ 522. A public statute may be received to prove the facts which it recites.⁶ Hence, in England it is held that a recital of a state of war, contained in a public statute, is evidence of such war;⁷ and that a recital in a public statute of disturbances and riots is proof of such disturbances and riots.⁸ In this country we have a series of cases to the same effect, in which the legislation of Congress was referred to, to indicate the extent and duration of the late civil war.⁹ But

¹ *Millett v. Marston*, 62 Me. 477; *True v. Bryant*, 32 N. H. 241; *Hill v. Scott*, 12 Penn. St. 168; *Gratz v. Beates*, 45 Penn. St. 495; *May v. State*, 14 Ohio, 461; *Rembert v. Brown*, 14 Ala. 860. As to records, however, see *Whart. on Ev.* § 645.

² Compare authorities in *Whart. Cr. Pl. & Pr.* § 278 *a*.

³ *Nesham v. Selby*, L. R. 13 Eq. 191; *aff. L. R.* 7 Ch. 400; *Clark v. Crego*, 47 Barb. 599; *Commissioners v. Washington Park*, 52 N. Y. 131; *Blair v. Hum*, 2 Rawle, 104; *Satterlee v. Bliss*, 36 Cal. 489; *Jordan v. Pollock*, 14 Ga. 145, and cases cited

in reference to confessions, *infra*, § 688; *Whart. on Ev.* § 1103.

⁴ *Harper v. West*, 1 Cranch C. C. 192; *Clarke v. Page*, 1 H. & J. 318; *Gilpatrick v. Foster*, 12 Ill. 355; *Lloyd v. McClure*, 2 Greene (Iowa), 139; *Carey v. Phil. Co.* 33 Cal. 694.

⁵ *Infra*, § 698.

⁶ See *Whart. on Ev.* §§ 286-292; *Whiton v. Ins. Co.* 109 Mass. 30; *Henthorn v. Shepherd*, 1 Blackf. 157; *State v. Sartor*, 2 Strobb. 60.

⁷ *R. v. De Berenger*, 8 M. & S. 67; *Whart. on Ev.* § 839.

⁸ *R. v. Sutton*, 4 M. & S. 532.

⁹ *Whart. on Ev.* §§ 286 *et seq.*

such proof is only *prima facie*, and may be limited or explained by other testimony.¹

§ 523. Recitals in private statutes are held to be evidence only so far as concern the parties, not reaching to strangers.² As against the party for whose relief the statute was passed,³ and as against the State,⁴ such recitals are *prima facie* proof; but they are not evidence against strangers.

Recitals in private statutes not usually evidence.

§ 524. The journals of Congress and of the state legislatures are the proper evidence of the action of those bodies,⁵ and are *prima facie* proof of the facts they recite.⁶ They are records to be proved by inspection,⁷ and cannot ordinarily be varied by parol.⁸

Journals of legislature admissible.

§ 525. Official public documents issued by the executive are to be received as *prima facie* proof of facts stated in them,⁹ and such is also the case with state papers when published under the authority of Congress,¹⁰ with diplomatic correspondence communicated by the President to Congress,¹¹ with the ordinances of foreign States promulgated by Congress,¹² and with the proclamations of a state executive,¹³ the authorized reports of state officials,¹⁴ and the charter of a city,¹⁵

So of executive documents.

¹ R. v. Greene, 6 A. & E. 548.

² Shrewsbury Peerage, 7 H. L. C. 13; Beaufort v. Smith, 4 Exch. 450; Cowell v. Chambers, 21 Beav. 619; Mills v. Colchester, 36 L. J. C. P. 214; Tayler v. Parry, 1 M. & Gr. 604; Ballard v. Way, 1 M. & W. 329; Elmendorff v. Carmichael, 3 Litt. (Ky.) 472.

³ State v. Beard, 1 Ind. 460.

⁴ Lord v. Bigelow, 8 Vt. 460.

⁵ Whart. on Ev. §§ 290-95; Jones v. Randall, 1 Cowp. 17.

⁶ See cases cited in Whart. on Ev. § 637.

⁷ Coleman v. Dobbins, 8 Ind. 156.

⁸ Wabash R. R. v. Hughes, 38 Ill. 176; Covington v. Ludlow, 1 Metc. (Ky.) 295; Whart. on Ev. § 980 a.

⁹ Thelusson v. Cosling, 4 Esp. 266; R. v. Franklin, 17 How. St. Tr. 638;

Talbot v. Seeman, 1 Cranch, 1; Ross v. Cutchall, 1 Binn. 399.

¹⁰ Whart. on Ev. § 525; Whiton v. Ins. Co. 109 Mass. 30.

¹¹ Bryan v. Forsyth, 19 How. 334; Radcliff v. Ins. Co. 7 Johns. 38.

¹² Talbot v. Seeman, 1 Cranch, 1.

Army registers, when authenticated by the secretary of war, have been held to be proof of the names of officers, of the dates of their commissions and of their resignations, though they cannot be received to show the pay and emoluments of officers. Wetmore v. U. S. 10 Pet. 647. As to judicial notice of military law see Whart. on Ev. § 297.

¹³ Lurton v. Gilliam, 1 Scam. (Ill.) 577.

¹⁴ Dulaney v. Dunlap, 3 Cold. 307.

¹⁵ Howell v. Ruggles, 5 N. Y. 444.

so far as concern the State from which these documents proceed. But it has been held that a report of the register of the state land office cannot be received to prove that lands have been patented to a railroad company.¹

III. NON-JUDICIAL REGISTRIES AND RECORDS.

§ 526. Where a statute requires the keeping of an official record for the public use, by an officer duly appointed for the purpose, and subject not merely to private suit but to official prosecution for any errors, such record, so far as concerns entries made in it in the course of business, is admissible in the courts of such State as *prima facie* proof of the facts it contains. Nor is it necessary to verify such record by the oath of the person keeping it. That it is directed by statute to be kept for the public benefit, and that it is kept, so far as appears on its face, with regularity and accuracy, entitles it to be received in evidence, and throws the burden of impeaching it on the opposite side. To make the record itself evidence, it is only necessary that it should be produced, and that it should be proved to have come from the proper depository.² But such documents, to be evidence, must be kept by public officers in pursuance of an official duty. Hence it has been held in a Maryland case, that police records, kept by the detective police of a city, in order to show charges made against particular individuals, cannot be put in evidence by a party so accused, in order to show the injury done him by being charged with theft; such records not being prescribed by statute, nor in any way traceable to the party sued for the injury.³ At the same time, entries of this class, though inadmissible as public records, may become evidence when made by a deceased person against his interest,⁴ or, as will be seen, when in discharge of a business duty.⁵

§ 527. Not merely are the records of public officers, national or state, when kept in accordance with statutes, thus admissible, but admissibility has been extended to official records, duly kept by municipal or other corpora-

¹ Gordon v. Bucknell, 38 Iowa, 438.

⁴ Whart. on Ev. § 226.

² Whart. on Ev. § 526.

⁵ Ibid. § 238. Infra, §§ 527-530.

³ Garvey v. Wayson, 42 Md. 187.

tions, which, as to third parties, are *prima facie* evidence of the facts duly entered by officers of such bodies, in the course of their duties.¹ Even a public officer's entry, when in the regular discharge of his duties, in a book he is by law required to keep, is *prima facie* evidence in his own favor when the performance of the acts registered is at issue.²

§ 528. When a registry of current events kept in a public voluntary institution is the only evidence attainable of a fact in litigation, such registry, on the principle that the best evidence is admissible evidence,³ may be admitted as *prima facie* proof. In accordance with this view, a record of weather kept at such a public institution has been held admissible to prove the temperature on a day as to which witnesses could not accurately speak.⁴ Such entries, however, must be subjected to the same tests, as to genuineness and primariness, as will presently be noticed in respect to parish records.

Books and registries kept by public institutions admissible.

§ 529. Under certain acts of Congress, log-books may be evidence of the facts they state. Their admissibility, however, is limited to the points the statutes designate; and they must be identified as duly kept. But independent of the statutory provisions, a log-book is admissible if kept by a deceased officer, when in the performance of his duties, or by an officer whose attendance is unobtainable.⁵

Log-book admissible under act of Congress.

IV. RECORDS AND REGISTRIES OF BIRTH, MARRIAGE, AND DEATH.

§ 530. An official registry, as we have already seen, is admissible, when kept in conformity with law and when duly authenticated, to prove such facts as the law requires to be registered. It follows that whenever a baptismal, marriage, or burial registry is kept in accord-

When duly kept, marriage and baptismal registries are admis-

¹ Whart. on Ev. § 527.

² Whart. on Ev. § 527.

³ See Whart. on Ev. §§ 72, 170-2.

⁴ De Armond v. Neasmith, 32 Mich. 231. See The Catharine Maria, L. R. 1 Adm. & Ec. 53; and see supra, §§ 526-7.

"The plaintiff's counsel offered in evidence a record of the weather kept

at the insane asylum for a number of years, for the purpose of showing the temperature of the weather in March, 1868. We think the record was admissible, and comes within the principle of *Sisson v. Cleveland & Toledo R. R. Co.* 14 Mich. 497." De Armond v. Neasmith, 32 Mich. 231, 233.

⁵ Whart. on Ev. § 529.

sible to
prove
facts.

ance with statute, such registry, being duly authenticated, is admissible to prove the facts which are within the statutory authority.¹ Even though there be no enabling statute, there is much strength in the position that as the canon law, so far as concerns the law of marriage, is part of English common law,² and as parish records are public records by the canon law, they are to be regarded by us as public records, and hence admissible in evidence, by our own common law.³ Yet as this position is open to doubt, and is in conflict with English rulings excluding registries by dissenting religious bodies, unless supported by proof *aliunde* as to their accuracy; ⁴ it is proper, in order to authenticate the facts stated in such records, to call the person by whom they were made, if living, to testify to their accuracy, or if he be dead, to prove that the entries were made by him in discharge of his duties. It should at the same time be remembered, that a copy of a foreign registry will be admitted wherever such registry is kept in accordance with the law of the place of entry,⁵ supposing that the identity, authority, and signature of the registrar be duly proved.⁶

¹ Gilb. Ev. (3d ed.) 77; *Wihe v. Law*, 3 Stark. 63; *May v. May*, 2 Str. 1073; *Draycott v. Talbot*, 3 Bro. P. C. 564; *Doe v. Barnes*, 1 M. & Rob. 389. See *State v. Wallace*, 9 N. H. 515; *State v. Horn*, 43 Vt. 20; *Jackson v. People*, 2 Scam. 232; *Glenn v. Glenn*, 47 Ala. 204. As to necessity of compliance with statute see *Kopke v. People*, cited *infra*, § 533.

"Parish registers are in the nature of records, and need not be produced, or proved by subscribing witnesses." Per Lord Mansfield, C. J., *Boit v. Barlow*, Dougl. 172. They are, therefore, provable under 14 & 15 Vict. c. 19. *Re Hall's Estate*, 9 Hare, App. xvi.

A burial entry is evidence to prove death. *Lewis v. Marshall*, 5 Peters, 470.

² See Whart. Conf. of L. §§ 169 *et seq.*

³ *Steyner v. Droitwich*, 1 Salk. 281; S. C., 12 Mod. 86; *Holt*, 290; *Kingston v. Lesley*, 10 S. & R. 383; *Am. Life & Trust Co. v. Rosenagle*, 77 Penn. St. 507; *Chouteau v. Chevalier*, 1 Mo. 343; and see argument of court in *Kennedy v. Doyle*, cited *infra*, § 531.

⁴ Whart. on Ev. § 653.

⁵ *Perth Peer*, 2 H. L. C. 865, 873, 874, 876, 877; *Abbott v. Abbott & Godoy*, 29 L. J. Pr. & Mat. 57; 4 Swab. & Trist. 254, S. C.; *Am. Life & Trust Co. v. Rosenagle*, 77 Penn. St. 507. In the absence of such proof, a copy of a baptismal register in Guernsey has been rejected in England. *Huet v. Le Mesurier*, 1 Cox Ch. R. 275. This rejection, according to Dr. Lushington, was "because it did not appear by what authority the register was kept. Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it

⁶ *State v. Dooris*, 40 Conn. 145.

§ 531. As a general rule, entries kept by a deceased person in the course of his business are admissible as *prima facie* proof of all facts relating to such business, in all cases in which the entries bear genuineness on their face, and were made at or near the time of the events they register. Independently of statutory prescriptions, the entries regularly made in his own books, or his official books, by a clergyman, or by the recording officer of a parish, or by the proper functionary of a religious society, are, after his decease, evidence of all facts which it was his duty officially to enter.¹

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§ 532. A registry of baptisms, however, has been ruled not to be proof of the alleged time of the child's birth, but only that he was born at the date of the baptism;² though it seems that it may be used, with other indicatory evidence, to show the place of birth,³ to indicate age,⁴ and to infer illegitimacy.⁵ In Massachusetts it has been accepted, cumulatively with other evidence, to prove the date of birth.⁶ Where, however, the statute provides that *births* shall be registered, then the registry is *prima facie* proof of the birth and its date.⁷ The identity of the person referred to, however, must be proved *aliunde*.⁸ The marriage registry proves not only the fact of marriage but the time of celebration.⁹

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is, and by an ancient custom a register was required to be kept there, different considerations might have applied to the case. . . . I am of opinion that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country." *Coode v. Coode*, 1 Curtis, 766.

¹ Whart. on Ev. § 654. See opinion of Gray, J., *Kennedy v. Doyle*, 10 Allen, 165.

² *R. v. Clapham*, 4 C. & P. 29; *Burghart v. Angerstein*, 6 C. & P. 690; *Wihe v. Law*, 3 Stark. 63; *Morrissey v. Ferry Co.* 47 Mo. 521; though see *Wintle*, in re, L. R. 9 Eq. 373.

³ *R. v. North Petherton*, 5 B. & C.

508. See *R. v. Lubbenham*, 5 B. & Ad. 968; *Clark v. Trinity Church*, 5 W. & S. 266.

⁴ *R. v. Weaver*, L. R. 2 C. C. 85; *Whitcher v. McLaughlin*, 115 Mass. 168.

⁵ *Cope v. Cope*, 1 M. & Rob. 271. The registry of baptism is no proof of the child's legitimacy. *Blackburn v. Crawfords*, 3 Wall. 175.

⁶ *Whitcher v. McLaughlin*, 115 Mass. 167.

⁷ *Derby v. Salem*, 30 Vt. 722; *Stoever v. Whitman*, 6 Binn. 416. See *Carskadden v. Poorman*, 10 Watts, 82.

⁸ *Morrissey v. Ferry Co.* 47 Mo. 521.

⁹ *Doe v. Barnes*, 1 M. & Rob. 386; *R. v. Hawes*, 1 Den. C. C. 270.

The mode of proving marriage will be found more fully discussed in a prior chapter.¹

§ 533. Entries in such a registry, however, must be made at first hand in order to be admissible.² Thus, a minister's entry of a baptism, administered by another person before his own official service began, the information of the baptism having been given him by the clerk, has been ruled inadmissible,³ though an entry by the proper officer may verify an act done by his official subaltern.⁴ Immediate-ness of entry, however, is not essential, if the entry be made by the officer himself, and there be no suspicious delay,⁵ though the registry must come from the proper custody,⁶ and the proper officer.⁷ But in a criminal issue, where the fact of marriage must be proved beyond reasonable doubt,⁸ the statute must be strictly complied with to make the registry by itself sufficient proof. Thus in Michigan, in a prosecution for bigamy, the only evidence of a first marriage was that of a ceremony in Ohio before a justice, under a license issued, not by a judge of probate, as required by statute, after examination, but by one signing himself "deputy clerk," with a full knowledge on the part of the justice of all the facts, and while defendant was under arrest, there being also proof of a refusal of the defendant to live with the woman as his wife at any time after such ceremony. This was ruled insufficient to sustain the verdict.⁹

§ 534. At common law, as we have already seen, a certificate from a party, even when acting officially, that he has done a particular thing, is inadmissible to prove such thing. If living, he must be called to prove the fact; if dead, it may be proved by his official entries.¹⁰ This rule applies to certificates of marriage and of birth, in cases where such certificates are not otherwise made evidence. Thus the certificate of a clergyman, given sixteen years after a marriage, that

¹ Supra, §§ 170, 171.

² See supra, § 251; Whart. on Ev. § 246.

³ Doe v. Bray, 8 B. & C. 813; Walker v. Wingfield, 18 Ves. 443.

⁴ Doe v. Andrews, 1 M. & Rob. 386.

⁵ Derby v. Salem, 30 Vt. 722.

⁶ Whart. on Ev. §§ 194 et seq.

⁷ Doe v. Fowler, 19 L. J. Q. B. 151.

⁸ Supra, § 171.

⁹ Kopke v. People, Sup. Ct. Mich. N. W. Rep. March 6, 1880. Supra, §§ 169 et seq., 173 a. See State v. Rowe, 61 Me. 171.

¹⁰ See supra, § 195.

he had married the husband to one claiming to be a prior wife, cannot, by itself, be received to establish such prior marriage, there being no record of such marriage in the registry of the church.¹ Under the Connecticut statute, however, a certificate of baptism, by a duly authorized minister, is admissible;² and such seems to be the rule under the Maine statute.³ When made evidence by statute, such certificates become only *prima facie* proof of the facts they duly set forth.⁴

§ 535. Copies of administrative records, or of papers deposited in public archives, are at common law inadmissible when the original can be had. Thus, a sworn copy of a marriage contract, executed in the presence of the lieutenant governor and Spanish commandant of Upper Louisiana, with a certificate of the commandant that the original was deposited in the archives of the territory, is not admissible to prove the marriage.⁵ Yet when the original cannot be had an exemplification is admissible, for the reason it is the best evidence attainable.⁶

Where a statute, as is the case in several States, requires the return of a certificate of marriage to be made by the officiating minister to the county clerk for record, the proper mode of proving such fact is by an exemplification of the certificate.⁷ But an exemplification of a foreign certificate of marriage will not be received unless it be proved that the record was kept in conformity with law, and that the person officiating was authorized to officiate.⁸

§ 536. We have already observed that for the purpose of proving pedigree, and other matters of family interest, family bibles and other records may be received.⁹ For the same purpose a family chart, regarded as authoritative by the family, may be put in evidence.¹⁰

¹ *Gaines v. Relf*, 2 How. 619.

² *Huntly v. Comstock*, 2 Root, 99.

³ *Dole v. Allen*, 4 Greenl. 527.

⁴ *Derby v. Salem*, 30 Vt. 722; *Jones's Succession*, 12 La. An. 397. See *Beates v. Retallick*, 28 Penn. St. 288.

⁵ *Chouteau v. Chevalier*, 1 Mo. 343. See *State v. Dooris*, 40 Conn. 145.

⁶ *Alivon v. Furnival*, 1 C., M. & R. 277; *Boyle v. Wiseman*, 10 Exch.

647; *Quilter v. Jones*, 14 C. B. (N. S.) 747; *Coode v. Coode*, 1 Curtis, 765; *Hyam v. Edwards*, 1 Dall. 2; *American Life Ins. & Trust Co. v. Rosenagle*, 77 Penn. St. 507.

⁷ *Niles v. Sprague*, 18 Iowa, 819.

⁸ *State v. Dooris*, 40 Conn. 145; Whart. on Ev. § 659.

⁹ Whart. on Ev. § 219.

¹⁰ *North Brookfield v. Warren*, 16 Gray, 171; Whart. on Ev. § 536.

V. BOOKS OF HISTORY AND SCIENCE: MAPS.

§ 537. Unless, as in prosecutions for libel, for the purpose of imputing certain facts to author or publisher, a book by a living author cannot be put in evidence. As a record of facts, it is, as to third parties, hearsay, and if the author's authority for these facts is sought, he must be called as a witness, whenever he is within the process of the court.¹ Nor can such book be received when secondary, even though the author and all others who could speak to the facts are dead. Thus Dugdale's *Monasticon Anglicanum* has been rejected as evidence to show that the Abbey de Sentibus was an inferior abbey, because the original records were producible.² But where the author is out of the reach of such process, then a book of history, travels, or chronicles, when not a compilation from another book which is producible, is admissible for what it is worth, so far as concerns facts out of the memory of living men.³ And, as a general rule, any approved public and general history (and of the fact of approval the court will take judicial notice⁴), when not secondary, as a second hand reduction of another producible work, is admissible to prove ancient facts of a public nature either at home or abroad. It is otherwise, however, as to matters of a private nature; such as the descent of families, or even the boundaries of counties.⁵ College catalogues,⁶ and peerage lists, and army and navy lists,⁷ are likewise inadmissible, if offered as to matters which could be proved by living witnesses. And the *Gazetteer of the United States*, without further authentication, cannot be received to prove the relative distances of geographical points.⁸

But to illustrate the meaning of words and allusions, books of

¹ *Houghton v. Gilbert*, 7 C. & P. 701; *Fuller v. Princeton*, 2 Dane Ab. cc. 48, 49; *Morris v. Harmer*, 7 Pet. 554; *U. S. v. Jackalow*, 1 Black U. S. 484; *Morris v. Edwards*, 1 Ohio, 524.

As to how far a court will take judicial notice of past history see Whart. on Ev. § 338.

² Salk. 281.

³ See Whart. on Ev. § 537 for cases.

⁴ Whart. on Ev. 282.

⁵ *Steyner v. Droitwich*, Skin. 623; 1 Salk. 281; 12 Mod. 85; *Evans v. Getting*, 6 C. & P. 586; *McKinnon v. Bliss*, 21 N. Y. 206.

⁶ *State v. Daniels*, 44 N. H. 383.

⁷ *Marchmont Peer. Min. Ev.* 62, 77; *Wetmore v. U. S.* 10 Pet. 647.

⁸ *Spalding v. Hedges*, 2 Penn. St. 240. In the Tichborne trial, maps of Australia were received to show where the defendant lived. Steph. Ev. art. 37.

general literary history may be referred to.¹ Thus in a case before the English Court of Exchequer,² it was ruled that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the course of literary composition, and explain the sense in which words are used, and matters of a like nature ; but that they cannot be resorted to for the purpose of proving facts relevant to the cause.³

§ 538. For reasons elsewhere discussed at large,⁴ treatises on such of the inductive sciences as are based on data which each successive year corrects and expands, must be refused admission when offered to prove the truth of facts contained in such treatises. Books of this class, therefore, though admissible, if properly authenticated, to prove the state of science at a particular epoch, when that is in issue, are inadmissible as independent substantive evidence to prove the facts they set forth.⁵ In an argument to a court, such works may, at the discretion of the court, be read, not as establishing facts (unless such books are regarded as matters of notoriety, as are ordinary dictionaries),⁶ but as exhibiting distinct processes

Books of inductive science not usually admissible.

¹ Whart. on Ev. § 282.

² Darby v. Ouseley, 1 H. & N. 1.

³ See Co. Lit. 264 a; Best's Ev. 802.

⁴ Whart. on Ev. § 665.

⁵ Collier v. Simpson, 5 C. & P. 73; Terry v. Ashton, 34 L. T. 97; Ashworth v. Kittridge, 12 Cush. 193; Whiton v. Ins. Co. 109 Mass. 24; Com. v. Sturtivant, 117 Mass. 122; Com. v. Brown, 121 Mass. 69; State v. O'Brien, 7 R. I. 336; Yoe v. People, 49 Ill. 410; Carter v. State, 2 Ind. 617; Gehrke v. State, 13 Tex. 568. As indicating a contrary practice see Ordway v. Haynes, 50 N. H. 159; Bowman v. Woods, 1 Greene (Iowa), 441; Bowman v. Torr, 3 Iowa, 571; Broadhead v. Wiltse, 35 Iowa, 429 (by statute); Cory v. Silcox, 6 Ind. 39; Luning v. State, 1 Chand. (Wis.) 264; Ripon v. Bittel, 30 Wis. 614; Stoudenmeier v. Williamson, 29 Ala.

558; Merkle v. State, 37 Ala. 139.

See article in 5 Cent. L. J. 439.

⁶ That Webster's Dictionary is so admissible see Adler v. State, 55 Ala. 16.

In Texas it is said that the extent to which counsel may read from legal authorities, or from works of general science, rests within the sound discretion of the court, and the manner of exercising such judicial discretion will not be revised on appeal except in a clear case of its abuse. Dempsey v. State, 3 Tex. Ap. 429.

Judge Redfield (1 Redfield on Wills, p. 145) tells us that the reading before the jury of "general treatises upon scientific and professional subjects has been allowed by many courts, either as part of the testimony or of the argument of counsel. But when objected to, they have not generally been allowed to be read, either to court or

of reasoning which the court, from its own knowledge as thus refreshed, is able to pursue.¹ But if read to establish facts, capable of proof by witnesses, such books cannot be received. Medical works, consequently, are inadmissible for the purpose of proving the facts they contain.² So in action for a libel, charging the plaintiff with being a rebel and traitor, "because he was a Roman Catholic," the defendant was not allowed to justify by citing books of authority among the Roman Catholics, which seemed to show that their doctrines were inimical to loyalty.³ It is true that an expert, when called to state the sense of his profession on a particular topic, may cite authorities as agreeing with him, and may refresh his memory by referring to standard works in his specialty.⁴ But such witnesses are not permit-

jury." For this he cites *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Ashworth v. Kittridge*, 12 Cush. 193; *S. P., R. v. Taylor*, 13 Cox C. C. 77. Such books have been allowed to be read in Indiana, Iowa, and Wisconsin; *Cory v. Silcox*, 6 Ind. 39; *Bowman v. Torr*, 3 Iowa, 571; and *Luning v. State*, 1 Chandler (Wis.) 264. *Contra*, *Carter v. State*, 2 Carter, 617; *Gehrke v. State*, 13 Tex. 568; *State v. O'Brien*, 7 R. I. 336.

Where this rule obtains, and where counsel, in their argument to the jury, read from medical books not in evidence, or proved to be authority upon the subject, it is the duty of the court to instruct the jury that such books are not evidence, but theories simply of medical men. *Yoe v. People*, 49 Ill. 410. At the same time it must be remembered that books of science relating to the law of the issue may be read in argument to the court. Such study by the court is in fact of great value to public justice. "I believe that those judges," well said Chief Justice Hornblower, when speaking judicially on this point, "who carefully study the medical writers, and pay the most respectful attention to

their scientific researches on the subject, will seldom if ever submit a case to a jury in such a way as to hazard the conviction of a wronged man." *State v. Spencer*, 1 Zab. 196. And a learned judge (Bartley, C. J.) has justly said, that even as to argument to the jury, "a pertinent quotation, or extract from a book of science or art, as well as from a classical, historical, or other publication, may, by way of illustration, be not only admissible, but sometimes highly proper. And it would seem to make no difference whether it is repeated by counsel from recollection, or read from a book. It would be an abuse of this privilege, however, to make it the pretence of getting improper matter before the jury." *Legg v. Drake*, 1 McCook, 286.

¹ See fully Whart. on Ev. §§ 282, 335; *Harvey v. State*, 40 Ind. 516. *Contra*, *R. v. Taylor*, 13 Cox C. C. 77; *Com. v. Wilson*, 1 Gray, 337.

² *Ibid.*; *Com. v. Sturtivant*, 117 Mass. 122; *Com. v. Brown*, 121 Mass. 69. *Supra*, § 407.

³ *Darby v. Ousely*, 1 H. & N. 1; *Powell's Evidence*, 4th ed. 105.

⁴ *Supra*, § 407; *Cocks v. Purday*, 2 C. & K. 270; *Collier v. Simpson*, 5 C.

ted in their testimony to read extracts from books on physical philosophy as primary proof.¹ It is clear, however, that when an expert cites certain works as authority, they may be put in evidence to contradict him.²

§ 539. Another state of facts arises when we approach books of exact science, in which conclusions from certain and constant data are reached by processes too intricate to be elucidated by a witness when on examination on a stand. The books containing such processes, if duly sworn to by the persons by whom they are made, are the best evidence that can be produced in that particular line.³ When the authors of such books cannot be reached, the next best authentication of the books is to show that they have been accepted as authoritative by those dealing in business with the particular subject. Hence the Carlisle and Northampton Tables have been admitted by the courts as showing what is the probable duration of life under particular conditions.⁴ In order to verify the book it is proper to prove, by a witness qualified to speak to the point, that it is in use in the particular line of business to which the book relates.⁵ It should at the same time be remembered that while the Carlisle and other tables may be received to prove certain results of a large induction, they cannot be permitted to control a litigation, as to the value of a life estate, so as to work substantial injustice.⁶

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VI. GAZETTES AND NEWSPAPERS.

§ 540. In England, by the Documentary Evidence Act, the government or official gazette is "*prima facie* evidence of any

& P. 74; McNaughten's case, 10 Cl. & F. 200; Pierson v. Hoag, 47 Barb. 248; Cory v. Silcox, 6 Ind. 39; Harvey v. State, 40 Ind. 516; Bowman v. Torr, 8 Iowa, 571; Ripon v. Bittel, 30 Wis. 614; State v. Terrell, 12 Rich. 821; Merkle v. State, 37 Ala. 139.

¹ Com. v. Wilson, 1 Gray, 337; Washburn v. Cuddihy, 8 Gray, 430; Com. v. Sturtivant, 117 Mass. 122. See fully supra, § 407. That such books cannot go out with the jury see State v. Gillick, 10 Iowa, 98.

² Ripon v. Bittel, 30 Wis. 614.

³ See supra, § 208. Even as to

these, however, there should be verification. For curious illustrations of blunders in books of this class see Jevons' Philosophy of Science, i. 244. Supra, § 8 *et seq.*

⁴ Mills v. Catlin, 22 Vt. 106; Schell v. Plumb, 55 N. Y. 598; Bank v. Hengendobler, 3 Penn. L. J. 37; S. C., 4 Penn. L. J. 392; Balt. & O. R. R. v. State, 33 Md. 542; Williams's case, 3 Bland Ch. 221; Donaldson v. R. R. 18 Iowa, 280; David v. R. R. 41 Ga. 223.

⁵ Rowley v. R. R. L. R. 8 Exch. 226.

⁶ Whart. on Ev. § 667.

proclamation, order, or regulation," of the government, or of any of its departments. At common law, a distinction is taken in this connection between grants or commissions to an individual, and the correspondence of the crown with the public as a body. The gazette is not at common law evidence of the grant of land to a subject, nor of the commissioning of an officer of the army; but it is admissible to prove proclamations, and addresses received by the crown, and other matters of exclusively public importance, and as to which there is no private record kept. The same distinction has been recognized in the United States.¹

§ 541. When it is important to ascertain whether certain information was current in a community at a particular time, so as to impute knowledge to a particular person, then it may be admissible to put in evidence the newspapers circulating at the time in such community for the purpose of showing that the fact in question was one of common local notoriety.² And the same course is taken when the object is to prove notice of dissolution of a partnership, or of market prices, when the newspaper containing the facts alleged is shown to have been likely to be read by, or its contents familiar to, the party charged.³

§ 542. Unless to charge a particular party with matter alleged to have been inserted by him in a newspaper; or to prove notoriety in the sense already stated; or to prove, by old newspapers, ancient facts not otherwise susceptible of proof; newspapers cannot be received in evidence.⁴ And when the object is to charge a particular advertisement on a particular person as its author, it is necessary to produce the original manuscript. It is only when the latter is non-producible that the printed copy can be received.⁵ So far as concerns ordinary events, a newspaper cannot be recognized as evidence.⁶ Thus the identity or history of a person cannot, as to matters of recent occurrence, which can be otherwise established, be proved by a newspaper notice.⁷

¹ Whart. on Ev. § 671.

² Whart. on Ev. § 672.

³ Ibid. §§ 673-4.

⁴ See Whart. on Ev. § 674 a.

⁵ Sweigart v. Lowmarter, 14 S. & R. 200.

⁶ See Ring v. Huntington, 1 Mill (S. C.), 162.

⁷ Fosgate v. Herkimer Man. Co. 9 Barb. 287.

§ 543. It has been held not enough, in order to bring home to a party knowledge of a newspaper notice, to show that the newspaper was circulated in the neighborhood of the party's residence.¹ But it will be enough, to enable the newspaper to go to the jury, to prove that it was taken by the party on whom it is sought to prove notice,² or that he attended habitually a reading room where it was on file, or was shown in some way to have been familiar with the paper.³

Knowledge of newspaper notice may be proved inferentially.

VII. PICTURES AND PHOTOGRAPHS: PLANS AND DIAGRAMS.

§ 544. Of persons who are dead, or cannot for other reasons be produced in court,⁴ duly authenticated pictures,⁵ and photographs⁶ are admissible in questions of pedigree and identity; though they are open to parol explanation.

Pictures and photographs are admissible.

¹ *Norwich Nav. Co. v. Theobald*, M. & M. 153; *Kellogg v. French*, 15 Gray, 354.

² *Godfrey v. Macaulay*, Pea. Ad. Cas. 155, n.; *Jenkins v. Blizard*, 1 Stark. 419; *Hart v. Alexander*, 2 M. & W. 484; *Leeson v. Holt*, 1 Stark. 186.

³ Whart. on Ev. § 675.

⁴ As to inspection see *supra*, § 811.

⁵ *Camoy's Peerage case*, 6 Cl. & F. 801.

⁶ Whart. & St. Med. Jur. ii. § 123; *Ruloff v. People*, 45 N. Y. 215; S. C., 5 Lansing, 261; *Udderzook's case*, 76 Penn. St. 340; S. C., Whart. on Hom. Appendix; *Shaible v. Ins. Co.* 9 Phila. 136; *aff. 1 Weekly Notes*, 369; *Beavers v. State*, 58 Ind. 530; *Luke v. Calhoun Co.* 52 Ala. 115.

See *Beers v. Jackman*, 103 Mass. 192, ruling that evidence of similarity was inadmissible in bastardy suits.

As to the secondary character of photographs see *supra*, § 175.

The admission of photographs, as a means of identification, is thus discussed by a learned judge of the Supreme Court of Pennsylvania:—

“All the bills of exceptions, except one, relate to this question of identity, the most material being those relating

to the use of a photograph of Goss. This photograph, taken in Baltimore, on the same plate with a gentleman named Langley, was clearly proved by him, and also by the artist who took it. Many objections were made to the use of this photograph, the chief being to the admission of it to identify Wilson as Goss; the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or a miniature painted from life, and proved to resemble the person, may be used to identify him, cannot be doubted, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life, and to resemble the person photographed, should not fill the same measure of evidence. It is true, the photographs we see are not the original likenesses; their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies taken from the original plate, called the negative, made sensitive by chemicals, and printed by the

tion. Photographs of places may, in like manner, be admitted when relevant; ¹ though the impression they give of depths and distances may require to be corrected *aliunde* by measurement.² Such photographs, also, must be verified by proof that they are true representations before they can be admitted by the court.³ Photographs of handwriting are in like manner admissible; ⁴ though in cases involving delicate questions of identity of hands, a photograph should not be relied on without investigating the refractive power of the lens, the angle at which the original was inclined to the sensitive plane, the accuracy of the focusing, and the skill of the operator.⁵ Photographs may also be received

sunlight through the camera. It is the result of art, guided by certain principles of science.

“In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but had seen a man known as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made, by experts, of this reliability, must depend upon the judicial cognizance we may take of photographs, as an established means of producing a correct likeness. The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and a common mode of taking and preserving views, as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which pro-

duce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses.” Agnew, C. J., *Udderzook v. Com.* 76 Penn. St. 352, 353.

¹ *Blair v. Pelham*, 118 Mass. 420; *Cozzens v. Higgins*, 1 Abb. (N. Y.) App. 451; *Church v. Milwaukee*, 31 Wis. 512.

² *Tichborne Trial*, Cockburn, C. J., Charge, ii. 640. See article in 20 Alb. L. J. 4.

³ *Marcy v. Barnes*, 16 Gray, 161; *Hollenbeck v. Rowley*, 8 Allen, 473; *Com. v. Coe*, 115 Mass. 481; *Walker v. Curtis*, 116 Mass. 98; *Blair v. Pelham*, 118 Mass. 420; *Ruloff v. People*, 45 N. Y. 215.

⁴ *Marcy v. Barnes*, 16 Gray, 161. *Infra*, § 561. See *Robinson v. Mandell*, cited *supra*, § 10.

⁵ *Taylor Will case*, 10 Abb. N. Y. Pr. N. S. 300; *Tome v. R. R.* 39 Md. 36. See *Daly v. Maguire*, 6 Blatch. 137; *Foster's Will case*. 34 Mich. 21; *Eborn v. Zimpelman*, 47 Tex. 503; *Robinson v. Mandell*, Pamph. R. 683 (Boston, 1868), gives some curious testimony as to inaccuracy of photographs of writings.

of records which cannot be brought into court.¹ Engravings of scientific results may, it seems, be admitted to illustrate an argument.² But as to all forms of pictorial or photographic representation, whether the representation is correct must be determined by the court before it can be received; and the ruling of the court below in this respect is not, it is said in Massachusetts, open to exception in error.³

¹ See *Stephens*, in re, L. R. 9 C. P. 187; *Daly v. Maguire*, 6 Blatch. 137; *Leathers v. Wrecking Co.* 2 Wood, 682. *Supra*, § 175.

² *Ordway v. Haynes*, 50 N. H. 159.

³ "A plan or picture, whether made by hand of man, or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. *Marcy v. Barnes*, 16 Gray, 161; *Hollenbeck v. Rowley*, 8 Allen, 473; *Cozens v. Higgins*, 1 Abbott (N. Y.), 451; *Ruloff v. People*, 45 N. Y. 213; *Udderzook v. Com.* 76 Penn. St. 340; *Church v. Milwaukee*, 31 Wis. 512. Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception. *Com. v. Coe*, 115 Mass. 481, 505." *Walker v. Curtis*, 116 Mass. 98.

In illustration of the use of photography, in connection with the production of evidence, the following cases, for which I am indebted to an eminent scientist, will be of value.

"In the case of the *Rumford Chemical Works v. Hecker*, 11 Blatch. 552, the question was raised as to the relative porosity of bread made with yeast in the usual manner, and that prepared with the baking powder of the complainants. Evidence was introduced by defendants as follows: President Henry Morton, of the Stevens Inst. of Technology, Hoboken, N. J., who organized the photographic observations of the eclipse of 7th August,

1869, under the Nautical Almanac Office, and otherwise an expert in photography, was produced, and deposed to having prepared sections of both varieties of bread of exactly equal thickness, and to having made microscopic or highly enlarged photographs of the same, under identical conditions. The original negatives of these, and also positive prints from the same, were received and filed as exhibits.

"In the case of *H. D. Cone v. Porter & Bambridge*, a question being raised as to the identity in character in embossed lines on writing paper claimed to infringe a patent for such lines when made of an 'ogee' form, the same expert above named was produced, and deposed to having prepared slips of each variety of paper under consideration, attaching the same side by side in the four positions, which would give every possible variety to the arrangement of light and shade in the experiment, and then making photographs of the entire sheet, or card, with a very oblique illumination.

"By this means the variations of surface in the embossed lines was strongly marked by light and shade, and the identity or difference of the various samples clearly shown.

"In the case of *Funcke v. New York Mutual Life Insurance Co.*, in 1876, in the Superior Court of New York city, a question arose as to the alteration of a check from \$100 to \$1,500. The alteration had been confessed by a notorious forger, who had been em-

§ 545. We have already had occasion to observe,¹ that parol evidence may be received of buildings, monuments, and other objects which cannot be brought into court. For this purpose, authenticated plans or diagrams of the *locus in quo* are admissible.² But such a plan ought not to contain any references to matters before the court, when such matters were not existing when the survey was made.³

And so of
plans and
diagrams.

ployed to make it, but who was under sentence for another offence. Photographs were exhibited, showing decided traces of the original writing, especially of the word 'One,' under the newly written 'Fifteen.' It was objected that these traces of the original writing, which were not visible on the check itself, were also invisible on certain of the photographs. It has been suggested to us by President Morton, that this was probably due to a too long exposure of the negatives not showing the traces. The ink, which had been obliterated by the use of dilute sulphuric acid and hypochloride of soda (Labaraque's solution), had left only a very faint trace of oxide of iron, which, by reason of its yellow color, would have a special absorbing power for the actinic or photographic rays, but yet even in this regard the difference between this remnant of the ink and the white paper was very slight, and if the exposure was at all too long, even the yellow traces reflected light enough to render the negative film opaque. It was therefore necessary that *just time enough* should be given to allow the white paper to produce its effect, when the slightly yellow parts would be distinguishable by their inferior action."

The following is from the Albany Law Journal of June 10, 1876:—

"A novel application of the art of photography was made in a case on trial before Mr. Justice Dykman, in

the Supreme Court Circuit, New York, on Friday, June 2, 1876. The question at issue was, whether the certification of a check, purporting to have been made by the teller of the bank on which it was drawn, was genuine, or a forgery. The teller swore that it was not his certificate, and several experts pronounced the signature a forgery; while other experts, called by the holder of the check, were equally positive that the signature was genuine. Thereupon the court-room was darkened, and 'Prof. Combs,' with the aid of a calcium light magic lantern, threw an image, from a photographic negative, of the check in question, upon the wall, to show that the writing was free and flowing, and not the labored and retouched signature, which is the usual accompaniment of forgeries, and which some of the experts insisted appeared in this case. This exhibit seems to have had the desired effect, as the jury found that the signature was genuine." See *infra*, § 561.

¹ *Supra*, § 168.

² *Jones v. Tarleton*, 9 M. & W. 84; *R. v. Fursey*, 6 C. & P. 84; *Wood v. Willard*, 36 Vt. 81; *Blair v. Pelham*, 118 Mass. 420; *Stuart v. Binsse*, 10 Bosw. (N. Y.) 436; *Vilas v. Reynolds*, 6 Wis. 214; *Shook v. Pate*, 50 Ala. 91; *Gavignan v. State*, 55 Miss. 533. See several instances given in Bemis's Webster Trial.

³ *R. v. Mitchell*, 6 Cox C. C. 82.

VIII. PROOF OF DOCUMENTS.

§ 546. The burden of proving the due execution of a document lies on the party seeking to put it in evidence.¹ When offered for a collateral purpose, a *prima facie* proof of execution is sufficient.² Execution may be proved by the admission of the party, unless such proof is required by law to be by subscribing witnesses.³ Whether an admission can prove the contents of a paper is elsewhere discussed.⁴

Document to be proved by party offering.

§ 547. It is noticed elsewhere that the handwriting of attesting witnesses, after the lapse of thirty years, need not be proved.⁵ The same rule is applied to ancient documents unattested by witnesses, and which are taken from proper depositories.⁶

Documents over thirty years old prove themselves.

§ 548. Where, for the purposes of verification, it is important to go back beyond thirty years, a person who is familiar (from having had occasion to examine old deeds and other papers indisputably traceable to the party whose signature is contested) with the handwriting in question may be permitted to testify as to the genuineness of a document.⁷

Such documents may be verified by experts.

§ 549. Though the testimony of the alleged writer is of much value in determining the genuineness of a writing imputed to him,⁸ it is not necessarily, even supposing him to be free from bias, the strongest producible.⁹ I may remember having written or signed a particular document, and this recollection, taken in connection with my recognition of my own signature, forms strong evidence.

Handwriting may be proved by the writer himself, or his admission.

¹ Supra, §§ 319 *et seq.*; Whart. on Ev. § 680.

² Means v. Means, 7 Rich. 533.

³ Wright v. Wood, 23 Penn. St. 120; Powell v. Adams, 9 Mo. 758. Infra, § 687. See Whart. on Ev. § 1095.

⁴ Infra, § 684.

⁵ See supra, § 190.

⁶ Whart. on Ev. § 547.

⁷ Fitzwalter Peerage case, 10 Cl. & F. 193; Jackson v. Brooks, 8 Wend. 426; Sweigart v. Richards, 8 Penn. St. 436; Cantey v. Platt, 2 McCord, 260; Smith v. Rankin, 20 Ill. 14. See infra, § 847.

⁸ See Com. v. Taylor, 5 Cush. 605; State v. Hooper, 2 Bailey, 214. See, generally, supra, §§ 160, 360.

For a discussion of the presumption of continuance of individuality in handwriting see 1 Criminal Law Mag. 38 *et seq.* Infra, § 845.

⁹ In the trial of Carswell at Glasgow, in May, 1791, for the forgery of bank notes, one of the banker's clerks, whose name was on the forged note, swore distinctly that it was his handwriting, while he spoke hesitatingly with regard to his genuine subscription. Wills on Cir. Ev. 112.

But it by no means follows that I am the person most able to distinguish my own writing from a skilful forgery. Those who are experts in respect to handwriting are able to observe delicate shades which may be imperceptible to me, and to apply tests of which I may be ignorant. So a rude penman may be unable to frame his signature in such a way as to present to him any positive differentia. At the same time, the belief of persons accustomed to use their pens with ordinary frequency, as to the genuineness of their signature, is entitled to great consideration;¹ and it is one of the benefits of the late statutes making parties witnesses, that the testimony of parties to their own signature can now be obtained by the ordinary common law processes.² Much less weight, however, belongs to the casual, extra-judicial admission of a person that a certain writing is his. To make such admission receivable, it must appear that the writing was shown to him; and even then he may show that his admission was founded on mistake. But, in any view, such admission is *prima facie* evidence,³ and on indictments for libel is admissible to prove complicity of the defendant in a libellous publication.⁴

§ 550. In England, by statute, a person whose handwriting is in dispute may be called upon by the judge to write in his presence, and such writing may be compared with the writing in litigation.⁵ In this country similar statutes have been adopted. No doubt occasional advantages may flow from the application of this test.⁶ To such evidence, however, it may be objected that a person who is called upon to write, in a court-house, a piece for judicial inspection, may have strong motives to modify his usual style of writing, and in any view, such writing would be likely to be more formal and regular than a current business hand, and to perplex rather than convince experts.⁷ Nor should it be forgotten that nervousness, at

¹ Bank cases, R. & R. 378; R. v. Newland, 2 East P. C. 1001-2; 1 Leach, 311.

² See *infra*, § 550.

³ Whart. on Ev. § 725. *Infra*, §§ 680, 684. See *Hammond v. Varian*, 54 N. Y. 400.

⁴ See Whart. Crim. Law, 8th ed. § 1623.

⁵ See *Devine v. Wilson*, 10 Moore P. C. 502; *Cobbett v. Kilminster*, 4 F. & F. 490.

⁶ See *Chandler v. Le Barron*, 45 Me. 534.

⁷ As refusing to permit a party to write a paper in court as a basis for comparison see *Williams v. State*, 61 Ala. 33.

such a moment, may subdue in the writing its usual characteristics. At the same time, on cross-examination of a witness who has denied his signature, such a practice is proper and efficient, though it could not be compelled when the witness sets up his privilege in respect to self-crimination.¹ Neither should a party be permitted to manufacture evidence for himself by writing his name as a basis for a comparison of hands by a jury.²

Evidence of handwriting by another is in no sense secondary to evidence of such handwriting by the writer himself.³

§ 550 *a*. That a witness saw the party charged write the particular document is sometimes called direct proof. But it is not direct proof. It depends, for credibility, on ^{Witness to signature.} two conditions. In the first place, the witness must have been capable of accurately and honestly observing, and of accurately and honestly narrating.⁴ In the second place, the identity of the party charged and that of the document must be shown beyond reasonable doubt. Of course, when the witness formally attests a document, doubts as to the identity of the document are much reduced. But in this, as in all other cases of what is called "direct" testimony, so far as such testimony depends upon the statement of a single witness as to what he saw, the risk of perjury as well as of mistake must be kept in mind.

§ 551. It does not follow that because I have seen a person write I am able subsequently to identify his writing on documents which I have never previously seen. I may see a person write several times without becoming by any means as familiar with his handwriting as I would be by maintaining with him a protracted correspondence. I may watch him but listlessly, or at a distance, as one

¹ "There are cases to the effect that, where a witness has denied his signature to a document, he may be called upon, in cross-examination, to write his name in open court, in order that the jury may compare such writing with the controverted signature; but this is merely as a part of the cross-examination, and for the purpose of contradicting the witness. *Doe v. Wilson*, 10 Moore P. C. 502, 530; *Chandler v. Le Barron*, 45 Me. 584;

Taylor on Evidence, § 1669." Ames, J., *King v. Donahue*, 110 Mass. 155.

² *King v. Donahue*, 110 Mass. 155; but see *Roe v. Roe*, 40 N. Y. Sup. Ct. 1.

³ *R. v. Hazy*, 2 C. & P. 458; *R. v. Hurley*, 2 M. & Rob. 473; *R. v. Benson*, 2 Camp. 508; *Smith v. Prescott*, 17 Me. 277; *Ainsworth v. Greenlee*, 1 Hawks, 190; *McCaskle v. Amarine*, 12 Ala. 17. Supra, §§ 160, 360.

⁴ See supra, §§ 369-375.

clerk may do another in a counting-room, without mastering the peculiarities of his penmanship. Still, with all these qualifications, the “presumption *ex visu scriptiois*,” as Mr. Bentham calls it,¹ not only lends to such testimony much weight, but makes it technically primary.² It has, however, been said that such knowledge of handwriting, in cases where forgery is charged, must be before the commencement of the suit; for it is argued that after a suit involving forgery has been instituted, a party is under too great a temptation to make evidence for himself to justify dependence on his samples of his penmanship. But this reasoning, as giving an absolute rule as to time, cannot now prevail in those States in which by statute interest is for the jury and not for the court, and parties are admitted to testify on their own behalf. Nor, on principle, can it be admitted as an inflexible test that evidence which a party has the opportunity of moulding in his own interests is to be ruled out. If all such evidence is to be excluded, comparatively little evidence could be let in.³ At the same time, as has been well observed,⁴ the knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered.⁵ Thus where, on an indictment for sending a threatening letter, the only witness called to prove that the letter was in the handwriting of the accused was a policeman, who, after the letter had been received and suspicions aroused, was sent by his inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a knowledge of his handwriting by seeing him write; his evidence was rejected, by Maule, J., on the ground, that “Knowledge obtained for such a specific purpose and under such a bias is not such as to make a man admissible as a *quasi expert* witness.”⁶

¹ Jud. Ev. iii. 598.

For other cases see Whart. on Ev. § 707. Inf. § 846.

² R. v. Tooke, 25 How. St. Tr. 71; R. v. Hensey, 2 Ld. Ken. 366; 1 Burr. 642; U. S. v. Prout, 4 Cranch C. C. 301; Hartung v. People, 4 Park. C. R. 319; Com. v. Smith, 6 S. & R. 568; State v. Hess, 5 Ohio, 7; State v. Stalmaker, 2 Brev. 1; State v. Anderson, 2 Bailey, 565; Strong v. Brewer, 17 Ala. 706 (case of a mark); Haynie v. State, 2 Tex. Ap. 168.

³ See Reid v. State, 20 Ga. 681.

⁴ Best's Ev. § 236.

⁵ See the judgments of Patteson and Coleridge, JJ., in Doe d. Mudd v. Suckermore, 5 Ad. & El. 703; S. P., Keith v. Lothrop, 10 Cush. 453; and infra, § 558. See also Doe v. Newton, 5 Ad. & El. 514.

⁶ R. v. Crouch, 4 Cox C. C. 163.

§ 552. Not only, therefore, must we conclude that knowledge of handwriting obtained exclusively by correspondence is not secondary to knowledge obtained by seeing the party write, but we must hold that knowledge obtained of handwriting by long correspondence, or by continuous business association with a party (*e. g.* as in the case of bank teller with depositor), is entitled, when the witness is experienced and reliable, to peculiar credit; and eminently is this the case when the witness has, in prior transactions, staked much on the knowledge which he is called on to attest, though he may never have seen the party write.¹ It is sufficient to admit such evidence that there is an acknowledgment, express or implied, by the party writing, of the writings from which the opinion of the witness is drawn.² If, for instance, W. writes to P. by post, to P.'s usual address, and an answer, purporting to come from P., is received by W. by post, this, if the correspondence continues, raises a presumption that P.'s letter is genuine, and thus enables W. to take it as the basis of his opinion as to P.'s handwriting.³ To notice another illustration: persons familiar with the signature of the officers of the bank to bank notes, such notes being proved to be treated by the bank as good, may be permitted to prove such signatures, although they were not personally acquainted with the writers.⁴ On the other hand, the testimony of a person, not an expert, familiar with the writing of a person charged with forgery, that the defendant did not commit a particular forgery, has been held inadmissible,⁵ though this ruling may be gravely questioned.⁶

Witness familiar with another's handwriting may prove it.

¹ See *supra*, § 548, as to such acquaintance with ancient writings.

² *R. v. Slaney*, 5 C. & P. 213; *Doe v. Suckermore*, 5 A. & E. 731; S. C., 2 N. & P. 46; *U. S. v. Keen*, 1 McLean, 429; *U. S. v. 3109 Cases of Champagne*, 1 Ben. 241; *Hammond's case*, 2 Greenl. 33; *State v. Hopkins*, 50 Vt. 316; *Com. v. Peck*, 1 Met. 428; *Com. v. Carey*, 2 Pick. 47; *U. S. v. Simpson*, 3 Penn. 437; *State v. Spence*, 2 Harring. 348. *Infra*, § 845.

³ *Carey v. Pitt*, Pea. Add. Cas. 130; *Gould v. Jones*, 1 W. Bl. 384; and other cases cited *Whart. on Ev.* § 708.

⁴ *State v. Carr*, 5 N. H. 367; *Amherst Bank v. Root*, 2 Met. 522; *State v. Stalmaker*, 2 Brev. 1; *State v. Candler*, 3 Hawks, 393; *Allen v. State*, 3 Humph. 367. See *Amherst Bank v. Root*, 2 Met. 522; *Wilson v. Betts*, 4 Denio, 201; *Bank of the Com. v. Mudgett*, 44 N. Y. 514; *Johnson v. Daverne*, 19 Johns. 134; *Donaghoe v. People*, 6 Parker C. R. 120; *Hess v. State*, 5 Ohio, 5; *Sill v. Reese*, 47 Cal. 294.

⁵ *Burress v. Com.* 27 Grat. 934. *Infra*, § 562.

⁶ *Infra*, § 559.

It is a prerequisite to the admission of such proof that the writings from which the witness has drawn his knowledge should be genuine.¹ It will not be enough that the witness obtains his knowledge from letters whose genuineness is in dispute.² It may be added that this kind of testimony is not excluded, as has been already noticed, by the fact that the writer of the instrument is himself in court, and could be called.³

§ 553. A witness called to testify as to handwriting, and who establishes a *prima facie* case of acquaintance with the handwriting of the person whose signature is in dispute, will be admitted by the court to testify,⁴ though before his admission he may be cross-examined as to his opportunities, so that his qualifications may be tested by the court.⁵ It is not necessary that the witness should swear to an actual *belief* in the genuineness of a writing. It is enough if he states his *opinion* as to such genuineness.⁶ Lord Kenyon went so far as to hold that it was admissible for a witness to testify merely that the contested writing was like the handwriting of the party to whom it is charged;⁷ and though this has been doubted by Lord Eldon,⁸ yet it is hard to say why the value of such testimony is not as much for the jury as for the court.⁹

¹ Doe v. Suckermore, 5 A. & E. 731, by Patterson, J.; Cochran v. Butterfield, 18 N. H. 115; McKeone v. Barnes, 108 Mass. 344; Com. v. Coe, 115 Mass. 481; Cunningham v. Bank, 21 Wend. 557; Boyle v. Colman, 13 Barb. 42; Magie v. Osborn, 1 Robt. (N. Y.) 689.

² Nat. Un. Bk. v. Marsh, 46 Vt. 443; Goldsmith v. Bane, 3 Halst. 87; McKonkey v. Gaylord, 1 Jones L. (N. C.) 94. See R. v. Benson, 2 Camp. 508.

³ Supra, §§ 160, 360, 551; Smith v. Prescott, 17 Me. 277; Ainsworth v. Greenlee, 1 Hawks, 190; Pomeroy v. Golly, Ga. Dec. pt. i. 26; McCaskle v. Amarine, 12 Ala. 17.

⁴ Goodhue v. Bartlett, 5 McLean, 186; Moody v. Rowell, 17 Pick. 490; Whittier v. Gould, 8 Watts, 485; Bar-

wick v. Wood, 3 Jones (N. C.), 306; Henderson v. Bank, 11 Ala. 855.

⁵ See Rogers v. Ritter, 12 Wall. 317; Slaymaker v. Wilson, 1 Penn. R. 216.

⁶ Watson v. Brewster, 1 Penn. St. 381; Shitler v. Bremer, 23 Penn. St. 413; Clark v. Freeman, 25 Penn. St. 133; Fash v. Blake, 38 Ill. 363; and see Utica Ins. Co. v. Badger, 3 Wend. 102. See supra, § 462.

⁷ Garrells v. Alexander, 4 Esp. 37, approved by Lord Wynford. See 2 Ph. Ev. 249, n. 2. As to cross-examination, see Whart. on Ev. §§ 531 *et seq.*

⁸ Eagleton v. Kingston, 8 Ves. 476. See also Cruise v. Clancy, 8 Irish Eq. 552; Taylor v. Sutherland, 24 Penn. St. 333; Taylor's Ev. § 1666.

⁹ See Benth. Jud. Ev. iii. 599.

§ 554. A witness may, on cross-examination, be tested by putting to him other writings, not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation.¹ The tendency, also, is to hold that the test writings, if declared by the witness to be genuine, may be shown by the cross-examining party to be not genuine, and may be given to the jury for comparison.² But a witness, when called to testify as to his own writing, should have the whole paper before him in order to enable him to make up his judgment. Hence, on examination of a party as to whether a certain writing is his, he cannot be compelled to answer whether the signature is his unless he is permitted to examine the paper to which it is appended.³

On cross-examination witness may be tested by other writings.

§ 555. In England, by the common law courts, a comparison of hands, as a mode of determining the genuineness of a writing, has been held inadmissible.⁴ In the United States we have a series of authorities which, following the English common law reasoning, exclude this mode of proof.⁵

By English common law comparison of hands is not permitted.

¹ See *State v. Hopkins*, 50 Vt. 316.

² See *Griffitts v. Ivory*, 11 A. & E. 322; 3 P. & D. 179; *Young v. Honner*, 2 M. & Rob. 537. *Infra*, § 562.

³ *North Am. Ins. Co. v. Throop*, 22 Mich. 146.

⁴ *Garrels v. Alexander*, 4 Esp. 87; *Bromage v. Rice*, 7 C. & P. 548; *Hughes v. Rogers*, 8 M. & W. 123.

⁵ *Jackson v. Phillips*, 9 Cow. 94; *Titford v. Knott*, 2 Johns. Cas. 210 (now, however, altered by statute); *People v. Hewitt*, 2 Parker C. R. 20; *Bank of Penn. v. Haldeman*, 1 Penn. 161; *Slaymaker v. Wilson*, 1 Penn. 216; *Penn. R. R. v. Hickman*, 28 Penn. St. 318; *Niller v. Johnson*, 27 Md. 6; *Rowt v. Kile*, 1 Leigh, 216; *Richardson v. Johnson*, 3 Brev. 51; *State v. Allen*, 1 Hawks, 6; *Pope v. Askew*, 1 Ired. 16; *Jumpertz v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Ill. 209; *State v. Fritz*, 23 La. An. 55. See, to same effect, *U. S. v. Craig*, 4

Wash. C. C. 729; *Shank v. Butsch*, 28 Ind. 19; *Woodard v. Spiller*, 1 Dana, 179; *Clark v. Rhodes*, 2 Heisk. 206; *State v. Givens*, 5 Ala. 747; *Bishop v. State*, 30 Ala. 34; *Hanley v. Gandy*, 28 Tex. 211; *Pierce v. Northey*, 14 Wis. 9; *State v. Miller*, 47 Wis. 520.

In Indiana the English rule was at first adopted; *Clark v. Wyatt*, 15 Ind. 27; then enlarged; *Burdick v. Hunt*, 43 Ind. 381; and then apparently revived in its original force. *Jones v. State*, 60 Ind. 241.

For a criticism on the common law rule see 10 Cent. L. J. pp. 121, 141.

The rule of the English common law courts in this respect was opposed to that of the ecclesiastical courts, which admitted comparison of hands. 1 Will. on Ex. 809; 1 Ought. tit. 225, §§ 1-4; *Doe v. Suckermore*, 5 A. & E. 708-10, per Coleridge, J.; *Beaumont v. Perkins*, 1 Phillim. 78; *Supt. v. Atkinson*, 1 Add. 215, 216; *Mackin v.*

§ 556. By the courts excluding comparison in hands a single exception is made; when a writing, proved to be that of the party whose signature is in litigation, is already in evidence, having been put in for other purposes, then it is admissible to resort to this writing in order to determine the genuineness of the litigated instrument.¹

Exception
as to test
paper al-
ready in
court.

Grinslow, 2 Cas. temp. Lee, 335; 2 Add. 91, n. a. S. C.

The Act of Parliament of 28 & 29 Vict. c. 18, enacts, in section eight, "that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witness; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Section one of the same act provides, that the above enactment—in common with certain other clauses relating to evidence—"shall apply to all courts of judicature, as well criminal as others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland." This rule has been adopted by the committee for privileges in the House of Lords. *Shrewsbury Peer*. 7 H. L. C. 1, 15.

Under this statute it has been held, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury but of the judge (see *Egan v. Cowan*, 30 Law Times, 223, in Ir. Ex.), may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause; *Birch v. Ridgway*, 1 F. & F. 270; *Creswell v. Jackson*, 2 F. & F. 24; and next, that the comparison may be made either by witnesses, or without the intervention of any witnesses at all, by the jury themselves;

Cobbett v. Kilminster, 4 F. & F. 490, per Martin, B.; or, in the event of there being no jury, by the court.

¹ *Solita v. Yarrow*, 1 M. & Rob. 133; *Waddington v. Cousins*, 7 C. & P. 595; *Perry v. Newton*, 1 Nev. & P. 1; 5 Ad. & E. 514; *Myers v. Toscan*, 3 N. H. 47; *State v. Carr*, 5 N. H. 367; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Randolph v. Loughlin*, 48 N. Y. 458; *Williams v. Drexel*, 14 Md. 566; *Duncan v. Beard*, 2 N. & McC. 401; *Henderson v. Hackney*, 16 Ga. 521; *North Bk. v. Buford*, 1 Duv. 335; *Brobston v. Cahill*, 64 Ill. 358; *Goodyear v. Vosburgh*, 63 Barb. 154; *State v. Miller*, 47 Wis. 520.

In *Moore v. U. S.* 91 U. S. 270, the question is thus discussed by Bradley, J.:—

"The general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. It is not distinctly stated, in this case, that the writing used as a basis of comparison was admitted to be in the claimant's hand; but it was conceded by counsel that it was, in fact, the power of attorney given by him to his attorney, in fact, by virtue of which he appeared and presented the claim to the court. This certainly amounted to a declaration, on his part,

§ 557. In other States it is the practice to admit as a basis of comparison any papers, whether in themselves relevant to the issue or not, if they can be shown to be the uncontested writings of the party whose signature is disputed.¹ In Pennsylvania, however, it is said that at common law the proof from comparison of hands

In some jurisdictions comparison generally is permitted.

that it was in his hand, and to pretend the contrary would operate as a fraud on the court. We think it brings the case within the rule, and that the Court of Claims had the right to make the comparison it did." See *Medway v. U. S.* 6 Ct. of Cl. 421; *U. S. v. Chamberlain*, 12 Blatch. 890.

As denying this exception see *Tome v. R.* 39 Md. 90; *Outlaw v. Hurdle*, 1 Jones (N. C.), 150; *Otey v. Hoyt*, 3 Jones (N. C.), 407.

See also remarks of Davis, J., in *Rogers v. Ritter*, 12 Wall. 322.

In a New York case it was said: "The suit was upon a single note purporting to have been made by the respondent, the signature to which he claimed to be a forgery. The plaintiff was permitted, against the respondent's objection upon the trial, to put other notes in evidence purporting to have been made by him, the signatures to some of which were admitted to be genuine, and to others claimed to be forgeries. I am unable to see how these other notes were competent evidence, and what possible bearing they could have upon the issues upon trial. As they were not competent evidence for any other purpose, they could not be received in evidence to enable the jury to compare the signatures to them with the signature to the note in suit. That such evidence is incompetent is well settled. *Van Wyck v. McIntosh*, 14 N. Y. 439; *Dubois v. Baker*, 30 N. Y. 355." *Earl, C., Randolph v. Loughlin*, 48 N. Y. 458. See also, to same effect, *Baker v. Squier*, 1 Hun, 448;

S. C., 3 S. C. 465; *Bank of Com. v. Mudgett*, 44 N. Y. 514; *S. C.*, 45 Barb. 663; *Ellis v. People*, 21 How. Pr. 356. In criminal cases comparison of hands is therefore inadmissible. *People v. Spooner*, 1 Denio, 343.

It was held in 1880, by the New York Court of Appeals, that signatures could not be introduced for the purposes of comparison, though signatures already in evidence could be used for this purpose. *Merritt v. Campbell*, *Rapallo, J.*, citing *Miles v. Loomis*, 75 N. Y. 288. See *infra*, § 569.

To the same effect is a learned opinion of Walker, J., in *Brobston v. Cahill*, 64 Ill. 358. See *Vinton v. Peck*, 14 Mich. 287.

¹ *Hammond's case*, 2 Greenl. 33; *Myers v. Toscan*, 3 N. H. 47; *State v. Hastings*, 53 N. H. 452; *Adams v. Field*, 21 Vt. 256; *State v. Ward*, 39 Vt. 225; *State v. Hopkins*, 50 Vt. 316; *Homer v. Wallis*, 11 Mass. 309; *McKeone v. Barnes*, 108 Mass. 344; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315; *Com. v. Eastman*, 1 Cush. 189; *Keith v. Lothrop*, 10 Cush. 453; *Martin v. Maguire*, 7 Gray, 177; *Com. v. Williams*, 105 Mass. 62; *Com. v. Whitman*, 121 Mass. 361; *Lyon v. Lyman*, 9 Conn. 55; *McCorkle v. Binns*, 5 Binn. 340; *Bank of Lancaster v. Whitehill*, 10 S. & R. 110; *Baker v. Haines*, 6 Whart. 284; *Travis v. Brown*, 43 Penn. St. 9; *Haycock v. Greup*, 57 Penn. St. 438; *Bragg v.*

must be viewed as supplementary, and cannot be relied on exclusively,¹ and that the comparison is to be made by the jury, not by experts.² To the admission of a test paper it is essential

Colwell, 19 Oh. St. 407; Van Sickle v. People, 29 Mich. 61; Robertson v. Miller, 1 McMull. (S. C.) 120; Mayo v. State, 30 Ala. 32; Whitney v. Bunnell, 8 La. An. 429; State v. Fritz, 23 La. An. 55; State v. Scott, 45 Mo. 302; but see State v. Clinton, 67 Mo. 380.

¹ Haycock v. Greup, 57 Penn. St. 438.

² Travis v. Brown, 43 Penn. St. 9; Clayton v. Siebert, 3 Brews. 176. See State v. Scott, 45 Mo. 302; Phillips v. State, 6 Tex. App. 364; Hatch v. State, Ibid. 384; and see *contra*, Huston v. Schindler, 46 Ind. 38.

As to Pennsylvania statute admitting such testimony in criminal cases see Brightly's *Purd.* i. 631.

As to Iowa statute, to same effect, see Baker v. Mygatt, 14 Iowa, 131.

In Pennsylvania, to prove the writing of a person deceased at least forty years previously, witnesses are allowed to speak from a comparison with signatures and writings in family records, admitted by the family to be in the same handwriting; from letters in possession of the family, purporting to be signed by the party; and from official documents acted upon as genuine. Sweigart v. Richards, 8 Penn. St. 436.

It has been held in the same State that a witness, although he cannot base his testimony exclusively on comparison of hands, can refresh his memory by inspecting genuine writings; McNair v. Com. 26 Penn. St. 388; see, to same effect, Redford v. Peggy, 6 Rand. (Va.) 316; and that he may base his judgment on comparison of hands when he saw the signature attached to the test paper, or when the

party admitted such signature to be his. Power v. Frick, 2 Grant (Penn.) Cas. 306. See, as giving a still more liberal rule, Travis v. Brown, 43 Penn. St. 9.

In Alabama, on the trial of an indictment for murder, the question before the jury was the identity of the prisoner with the murderer. The State offered in evidence the registers of three several hotels, each in a different city, accompanied by parol proof that the three names were written by the prisoner, and that he was known by those names respectively in the three cities; and they were admitted without objection. It was held, that in considering the question whether the three names were written by the same person, the jury might compare the handwritings in the several registers. Crist v. State, 21 Ala. 137.

In the court of inquiry held at West Point, in April, 1880, to investigate the cause of an alleged outrage on a cadet, the court permitted experts to be examined for the purpose of comparing the examination papers of certain cadets with an anonymous letter alleged to have been received by the complainant. See *infra*, § 849.

In South Carolina, other papers, proved or admitted to have been written by the party whose handwriting is in contest, are receivable "in aid of doubtful proof;" but the "testimony is not entitled to any very high respect or consideration." Bennett v. Matthewes, 5 S. C. 478; citing Boman v. Plunkett, 2 McC. 518; Bird v. Miller, 1 McM. 125; but see State v. Clinton, 67 Mo. 380.

that it should be proved to be genuine, to the satisfaction of the court.¹

The mere finding of a diary on a party, with an admission by him that it belonged to him, is not a sufficient authentication of the writing to justify its use as a standard.² Press copies cannot be introduced as a basis of comparison, even where the original would be admissible;³ nor can photographic copies.⁴

§ 558. A test paper, to be admitted for the purpose of forming a basis for comparison, should be free from any suspicion of concoction in order to affect the litigated issue.⁵

Test papers must be free from suspicion.

§ 559. An expert, apart from the vexed question of comparison of hands, is admissible to determine whether a contested writing is feigned or natural;⁶ though in absence of evidence on behalf of the party charged that

Experts admissible to test writings.

¹ *McKeone v. Barnes*, 108 Mass. 347; *Com. v. Coe*, 115 Mass. 503.

² *Van Sickle v. People*, 29 Mich. 61.

³ *Com. v. Eastman*, 1 Cush. 189. See *Com. v. Jeffries*, 7 Allen, 561. See *supra*, § 177.

⁴ *Supra*, § 544.

"The testimony of the photographer comes within the same principle as that of Paine. It was offered to establish the forgery of the certificates in controversy, by comparing them with copies (obtained by photographic processes, either magnified or of the natural size) of certain signatures assumed or admitted to be genuine, and pointing out the differences between the supposed genuine and disputed signatures. As a general rule, in proportion as the media of evidence are multiplied, the chances of error or mistake are increased. Photographers do not always produce exact fac-similes of the objects delineated; and however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at best a mimetic art, which furnishes only secondary impressions of the original,

that vary according to the lights or shadows which prevail whilst being taken." *Bowie, J., Tome v. Parkersburg R. R. Co.* 39 Md. 90, 91-93. *Bartol, C. J., and Alvey, J., dissenting.*

⁵ *Supra*, §§ 551, 552. This point is well shown in the argument of Ames, J., in *King v. Donahue*, 110 Mass. 155.

Mr. Chabot's exposition of the handwriting of Junius will illustrate the value of this evidence. See also the fac-similes of Junius's writing in the fourth volume of the *Chatham Correspondence*, and an ingenious article in the *London Times* of May 22, 1871.

Nowhere, however, has the value of this kind of evidence been better shown than in Chief Justice Cockburn's masterly charge in the *Tichborne trial*, *R. v. Castro*, Charge, ii. 770 *et seq.*, to which the reader is particularly referred.

Errors of spelling may be used to prove identity of authorship. *R. v. Castro*, Charge of Cockburn, C. J.; *U. S. v. Chamberlain*, 12 Blatch. 390; *Com. v. Coe*, 115 Mass. 481.

⁶ *Sweetzer v. Lowell*, 33 Me. 448;

the signature is simulated, an expert will not be received to prove it was not simulated.¹ So experts are permitted to testify as to the period to which a writing may be assigned;² as to the nature of the ink or other material used;³ whether a certain writing shows comparative ease and facility;⁴ whether certain figures in a check have been changed;⁵ what is the dif-

Withee v. Row, 45 Me. 571; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Webster*, 5 Cush. 295; *Demerritt v. Randall*, 116 Mass. 331; *Lyon v. Lyman*, 9 Conn. 55; *Lansing v. Russell*, 3 Barb. Ch. 325; *Goodyear v. Vosburgh*, 63 Barb. 154; *Vanwyck v. McIntosh*, 14 N. Y. 439; *Dubois v. Baker*, 30 N. Y. 355; *People v. Hewitt*, 2 Parker C. R. 20; *Hubley v. Vanhorne*, 7 S. & R. 185; *Calkins v. State*, 14 Oh. St. 222; *Jones v. Finch*, 37 Miss. 461. An interesting and curious article on this topic, by Mr. R. W. Piper, will be found in the *Am. Law Reg.* for May, 1879.

¹ *Kowing v. Manly*, 49 N. Y. 193; S. C., 57 Barb. 179, qualifying *People v. Hewitt*, 2 Parker C. R. 20. See also, to same effect, *Merchant's Will*, 1 Tucker (N. Y.), 151; *People v. Spooner*, 1 Denio, 343. As rejecting the testimony of experts to prove forgery see *Bank v. Jacobs*, 1 Penn. R. 161; *Lodge v. Phipper*, 11 S. & R. 333. See also a review of *Robinson v. Mandell*, in 4 *Amer. Law J.*, 625. The same case is noticed *supra*, § 9.

"We think that the evidence offered to prove that the order produced by the defendants was not in a simulated handwriting was properly rejected. The plaintiff had not introduced any evidence to show that it was in a simulated handwriting, but had testified to the fact that it was not written by him. It was incumbent upon the defendants to prove that the order was in the handwriting of the

plaintiff; and we do not think that, as the evidence stood, the opinion of an expert, that the signature was not in a simulated hand, was competent for the purpose of establishing that it was the plaintiff's. In the cases cited, 3 B. Ch. 325, and 17 Pick. 490, for the purpose of proving that a mark or signature was not genuine, evidence of experts was admitted to show that the writing was simulated. The only case cited in which evidence was admitted to show that the writing was not simulated is that of *The People v. Hewitt*, 2 Park. Cr. R. 20, where, on a trial of an indictment for forgery, the prisoner was allowed to prove, by an expert, that the signature was not in a simulated hand. Whatever effect might be given to such evidence, in a criminal trial, for counterfeiting or forgery, as to which we express no opinion, we do not think it competent for the purpose of proving the genuineness of a signature against a party sought to be charged thereby." *Rapallo, J., Kowing v. Manly*, 49 N. Y. 203.

Other points of expert testimony in connection with forgery are discussed in a future section. *Infra*, § 847.

² *Doe v. Suckermore*, 5 A. & E. 703; *R. v. Williams*, 8 C. & P. 434; *Tracy Peerage*, 10 Cl. & F. 154; *Davis v. Mason*, 4 Pick. 156. See *People v. Spooner*, 1 Denio, 343.

³ *Dubois v. Baker*, 30 N. Y. 355.

⁴ *Demerritt v. Randall*, 116 Mass. 331.

⁵ *Nelson v. Johnson*, 18 Ind. 329; *Pate v. People*, 3 Gilm. 644.

ference between the substance of an instrument and a forged addition ;¹ whether certain words were written before a paper was folded ;² what is the meaning of certain illegible marks or signs ;³ whether the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time ;⁴ whether a certain bank note is counterfeit,⁵ and for this purpose business men, long familiar with the notes, can be called ;⁶ whether certain words were written over others ;⁷ and as to the date and meaning of certain words upon an erasure.⁸ It has, however, been held inadmissible to ask an expert as to a remote contingency, as to which no special professional experience is needed to speak ;⁹ nor can an expert be examined as to how far a person may improve his handwriting in a given time.¹⁰

§ 560. When comparison of hands is permitted, an expert can be called to make such comparison.¹¹ It has, however, been said

¹ *Hawkins v. Grimes*, 13 B. Mon. 258; though see *Daniel v. Toney*, 2 Metc. (Ky.) 523.

² *Bacon v. Williams*, 13 Gray, 525.

³ *Stone v. Hubbard*, 7 Cush. 595; *Collender v. Dinsmore*, 55 N. Y. 200.

⁴ *Quinsigamond Bk. v. Hobbs*, 11 Gray, 250; *Fulton v. Hood*, 34 Penn. St. 365. See *Jewett v. Draper*, 6 Allen, 434.

“ The fourth assignment of error is, that the court erred in admitting the testimony of so-called experts in regard to receipts which were in evidence. It was alleged, and direct evidence was given by the plaintiff below to prove, that the receipts had been altered, and then experts were offered to show that these alterations were not made at the same time with the body of the receipt. It was ruled in *Fulton v. Hood*, 10 Casey, 365, that the testimony of experts is receivable, in corroboration of positive evidence, to prove that, in their opinion, the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time. This case is indeed the

converse of that, but the principle is undoubtedly the same, whether the evidence is of experts to attack or support the instrument.” *Sharswood, J., Ballantine v. White*, 77 Penn. St. 25.

⁵ *Jones v. Finch*, 37 Miss. 461.

⁶ *State v. Cheek*, 13 Ired. 114.

⁷ *Dubois v. Baker*, 30 N. Y. 355.

⁸ *Ibid.*; and *S. C.*, 40 Barb. 556; *Vinton v. Peck*, 14 Mich. 287; though see *Swan v. O'Fallon*, 7 Mo. 231.

⁹ *Thayer v. Chesley*, 55 Me. 393.

¹⁰ *McKeone v. Barnes*, 108 Mass. 344.

¹¹ *Benth. Jud. Ev.* iii. 599; *U. S. v. Keen*, 1 McLean, 429; *U. S. v. Chamberlain*, 12 Blatch. 390; *Hammond's case*, 2 Greenl. 33; *Woodman v. Dana*, 52 Me. 9; *Furber v. Hilliard*, 2 N. H. 480; *Carr v. State*, 5 N. H. 371; *State v. Shinborn*, 46 N. H. 497; *State v. Ravelin*, 1 Chipm. 295; *State v. Ward*, 39 Vt. 225; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Riley*, Thach. C. C. 67; *Amherst Bank v. Root*, 2 Met. 522; *Com. v. Williams*, 105 Mass. 62; *Lyon v. Lyman*, 9 Conn. 55; *People v. Caryl*, 12 Wend. 547; *Phoenix Bk. v. Philip*, 13 Wend.

that an expert cannot, as to an ancient writing, be admitted to give his conclusion from a comparison of hands,¹ though if no other proof is attainable such testimony should be received for what it is worth.²

§ 561. Photographers, who have been accustomed to scrutinize handwriting in reference to forgeries, and have been in the habit of using photographic copies for this purpose, may be examined as experts in questions of forgery, even though their opinion is founded partly on photographic copies, which they have themselves made, and which have been put in evidence.³ To enable, however, such photographic copies to be put in evidence, their accuracy and fairness must be proved.⁴

§ 562. An expert is open to cross-examination as to his qualifications,⁵ and he may be probed by test papers that may be presented to him.⁶

81; *Finch v. Gridley*, 25 Wend. 469; *Roe v. Roe*, 40 N. Y. Sup. Ct. 1; *People v. Hewitt*, 2 Parker C. R. 20; *Jackson v. Murray*, Anthon, 105; *West v. State*, 22 N. J. L. 212; *Com. v. Smith*, 6 S. & R. 568; *Hubley v. Vanhorne*, 7 S. & R. 185; *Lodge v. Phipper*, 11 S. & R. 333; *Powers v. Frick*, 2 Grant (Penn.) Cas. 306; *Sweigart v. Richards*, 8 Penn. St. 436; *Burkholder v. Plank*, 69 Penn. St. 235; *Ballantine v. White*, 77 Penn. St. 20. *Contra*, *Titford v. Knott*, 2 Johns. Cas. 211; *Bank of Penn. v. Haldeman*, 1 Penn. 161; *Niller v. Johnson*, 27 Md. 6; *Huston v. Schindler*, 46 Ind. 38; *State v. Harris*, 5 Ired. 287; *Com. v. Tutt*, 2 Bailey, 44; *Bird v. Miller*, 1 McMull. 125; *Bennett v. Matthewes*, 5 S. C. 478; *Johnson v. State*, 35 Ala. 370; *Moye v. Herndon*, 30 Miss. 110; *Jones v. Finch*, 37 Miss. 461; *Hanley v. Gandy*, 28 Tex. 211. In New York it is now held that an expert may be examined as to the genuineness of a signature, basing his opinion on signatures already in evidence. *Miles v. Loomis*,

75 N. Y. 288. See *Merritt v. Campbell*, cited *supra*, § 560.

"It may be considered as well settled in this State (Pennsylvania), by *Fulton v. Hood*, 10 Casey, 365, and *Travis v. Brown*, 7 Wright, 9, that after direct evidence has been given on the subject of handwriting, the evidence of experts is admissible in corroboration." *Sharswood, J., Burkholder v. Plank*, 69 Penn. St. 235; S. P., *Ballentine v. White*, 77 Penn. St. 20.

¹ *Fitzwalter Peerage case*, 10 Cl. & F. 193. *Supra*, § 548.

² *Supra*, § 548.

³ *Marcy v. Barnes*, 16 Gray, 161. See, however, *Taylor Will case*, 10 Abb. (N. Y.) Pr. N. S. 301; *Tyler v. Todd*, 36 Conn. 218. See *supra*, § 544; *Robinson v. Mandell*, cited *supra*, § 9. *Infra*, § 847.

⁴ *Ibid.* In *Tome v. R. R.* 39 Md. 36, it was ruled that such copies could not be put in evidence. See *supra*, § 544.

⁵ See *supra*, §§ 407-420.

⁶ *Supra*, §§ 510, 554; *Demerritt v.*

§ 563. Expert testimony should in all cases be closely scrutinized,¹ and there is peculiar reason why this scrutiny should be applied to questions of identity of handwritings. If the expert can produce in court the writings, and explain the grounds of his conclusions, the difficulties are much reduced; but it must be remembered that there are few branches of law on which interests so momentous (*e. g.* devolution of large estates, convictions of forgery) depend upon tests so exquisitely delicate as those applied to handwriting. It is well known that in cases of peculiar difficulty, when the difference, if there be any, between two handwritings is only noticeable by perceptions the most sensitive, experts, no matter how conscientious, often take unconsciously such a bias from the party employing them as to give to their judgment the almost infinitely slight impulse that turns the scale; nor is it strange that in an instrument so delicate aberrations from its true course should be produced by attractions or repulsions otherwise unappreciable. If an expert could be hermetically sealed in from such extraneous influences, his judgment might be depended on at least for impartiality. This, however, is impracticable. A jury is bound, therefore, to accept the opinion of an expert as to handwriting, even when uncontradicted, as an argument rather than a proof;² and to make allowance for all the disturbing influences by which the judgment of the expert may be moved.³

Testimony
of experts
to be
closely
scrutinized.

IX. INSPECTION OF DOCUMENTS BY ORDER OF COURT.

§ 564. Although inspection will not be compelled in cases in which the party holding the document claims that its production would criminate him,⁴ yet in criminal as well as in civil issues, in cases not affected by this limitation, a party is entitled, in view of litigation, to a

Rule
granted to
compel
production
of papers.

Randall, 116 Mass. 331. That an expert must have for this purpose special aptitude see *Burress v. Com.* 27 Grat. 934; *Goldstein v. Black*, 50 Cal. 462.

¹ *Supra*, § 420.

² *Whart. on Ev.* § 722, citing *Tracy Peerage*, 10 Cl. & F. 191; *Gurney v. Langlands*, 5 B. & A. 330;

R. v. Crouch, 4 Cox C. C. 163; *Cowan v. Beall*, 1 MacArthur, 270; *Borland v. Walrath*, 33 Iowa, 130.

³ See, as to divergence of experts as to handwriting, *Robinson v. Mandell*, cited *supra*, § 9.

⁴ *Infra*, § 566.

rule for inspection of such documents, in the hands of the opposite party, as are essential to the maintenance of contested rights. A defendant will on this principle be entitled to inspect certain letters material to the issue in the hands of the prosecution,¹ and his solicitor may be required to produce papers belonging to him which are likewise material to the issue.² To grant the order it is not necessary that the document be in the hands of the party against whom the order is asked. It is enough if the document is in the hands of his agent, or in some way subject to his authority.³

§ 565. Although when a document which appears to have been forged or stolen is produced in court, the court may order it to be impounded,⁴ the court will not, under a mere order for inspection, compel the impounding of papers, or their deposit with an officer of the court or any third party. The owner of the document is allowed to keep it in possession. The order simply permits its inspection, while in the hands of the owner or his attorney, by the opposing party or by witnesses.⁵

§ 566. We have just stated that the court will not compel the production of documents by a holder who alleges that their production will criminate him. This limitation has been frequently applied.⁶ The risk, however, to which the custodian is exposed, must be that of a real and not that of a nominally penal prosecution.⁷ Neither a *quo warranto*,⁸ nor a *mandamus*,⁹ is a criminal proceeding in the above sense. At the same time, inspection may be ordered when the applicant has reason to believe that the document in question

¹ *R. v. Colucci*, 3 F. & F. 103; *R. v. Hartie*, 6 C. & P. 105.

² *R. v. Brown*, 9 Cox C. C. 281.

³ See Whart. on Ev. § 742.

⁴ *Infra*, § 566.

⁵ *Thomas v. Dunn*, 6 M. & Gr. 274; *Rogers v. Turner*, 21 L. J. Exch. 9; Whart. on Ev. § 752.

⁶ *R. v. Purnell*, 1 W. Bl. 37; 1 Wils. 239, S. C.; *R. v. Heydon*, 1 W. Bl. 351; *R. v. Buckingham Js.* 8 B. & C. 375; *R. v. Cornelius*, 2 Str. 1210;

1 Wils. 142, S. C.; *Montague v. Dudman*, 2 Ves. Sen. 397; *Glynn v. Houston*, 1 Keen, 329; *Byass v. Sullivan*, 21 How. (N. Y.) Pr. 50; Wigr. Disc. § 130; Taylor's Ev. § 1351. See *Bradshaw v. Murphy*, 7 C. & P. 612. *Supra*, §§ 120, 463-5.

⁷ *R. v. Cadogan*, 5 B. & A. 902; 1 D. & R. 550.

⁸ *R. v. Shelley*, 3 T. R. 141; *R. v. Purnell*, 1 W. Bl. 45.

⁹ *R. v. Ambergate*, 17 Q. B. 957.

was forged ; and the court, on a proper case, will impound the document for the purposes of a criminal prosecution.¹

§ 567. In proper cases, in order to determine as to the meaning or genuineness of a writing, the court will authorize an inspection by experts or others having peculiar opportunities of identifying or distinguishing the document.² And the same right has been extended to cases where a defendant desires to obtain an inspection of the remains of a deceased person in the custody of the police.³

Documents may be examined by interpreters and experts.

¹ *Thomas v. Dunn*, 6 M. & Gr. 274; *Woolmer v. Devereux*, 2 M. & Gr. 758; S. C., 3 Scott N. R. 224; *Richey v. Ellis*, Alc. & Nap. 111; *Rogers v. Turner*, 21 L. J. Ex. 9; *Boyd v. Petrie*, L. R. 3 Ch. Ap. 818, overruling S. C., L. R. 5 Eq. 290.

² *Swansea Vale R. R. v. Budd*, L. R. 2 Eq. 274; *Boyd v. Petrie*, L. R. 3 Ch. Ap. 818, qualifying S. C., L. R. 5 Eq. 290. See *Att. Gen. v. Whitwood Local Board*, 40 L. J. Ch. 590.

³ *R. v. Spry*, 3 Cox C. C. 221. See *supra*, § 312.

CHAPTER XI.

JUDGMENTS AND JUDICIAL RECORDS.

I. BINDING EFFECT OF JUDGMENTS.

Judgment on same subject matter binds, § 570.

Parties must be the same, § 570 *a*.

Jurisdiction a prerequisite of admissibility of former proceedings, § 571.

Preliminary proceedings no bar, § 572.

Nor is a *nolle prosequi*, or dismissal, or *ignoramus*, § 573.

Verdict of acquittal without judgment a bar, otherwise with conviction, § 574.

Criminal prosecutions not barred by civil suits, § 575.

Military courts may make final rulings, § 576.

Judgment on *nolo contendere* estops, § 577.

Offences must be identical, § 578.

When evidence in second case is enough to have secured judgment in first, then first judgment estops, § 579.

When the same act has two indictable aspects, conviction of the one bars the other, § 580.

Illustrations in liquor cases, § 581.

Prior acquittal on ground of misnomer inadmissible, § 582.

And so of prior acquittal from variance, § 583.

Prior prosecution of minor offence enclosed in major is admissible in a subsequent trial of major, § 584.

Otherwise when there could be no conviction on first trial of major offence, § 585.

In prosecution for minor offence, it is admissible to put in evidence former prosecution of case containing major and minor, § 586.

When two persons are simultaneously killed by one blow, a prosecution for killing one is not barred by a prosecution for killing the other, § 587.

On a trial for stealing the goods of A., a former prosecution for stealing the goods of B. is not a bar, § 588.

"Simultaneous" does not mean coincidence in a point of time, § 589.

In battery, prosecution for prior simultaneous battery of another is a bar, § 590.

Judgment on successive offences not exhaustive, § 591.

Autrefois acquit must be specially pleaded, § 592.

Parol evidence admissible to identify or distinguish, § 593.

II. WHEN JUDGMENT MAY BE IMPEACHED.

Judgment may be collaterally impeached for want of jurisdiction, § 594.

So for fraud, § 595.

Foreign judgments impeachable for want of jurisdiction or fraud, § 596.

And so of convictions when *res inter alios acta*, § 596 *a*.

III. ADMINISTRATION, PROBATE, AND INQUISITION.

Letters of administration not conclusive proof of death or other recitals, § 597.

Probate of will not conclusive as to strangers, but otherwise as to parties, § 598.

Inquisition of lunacy only *prima facie* proof, § 599.

IV. JUDGMENTS IN REM.

Effect of judgments *in rem* in criminal cases, § 600.

V. JUDGMENTS VIEWED EVIDENTIALLY.

Proof of prior convictions when aggravated sentence is sought, § 601.

Conviction of principal evidence against accessory, § 602.

Judgments to establish other facts, § 602 a.

To prove judgment as such, record must be complete, § 603.

Minutes of court admissible to prove action of court, § 604.

Docket entries not admissible when full record can be had, § 605.

Rule relaxed as to ancient records, § 606.

For evidential purposes portions of record may be admitted, § 607.

But such portions must be complete, § 608.

Verdict inadmissible without record, § 609.

Parts of ancient records may be received, § 610.

Officer's returns admissible, § 611.

Return of *nulla bona* admissible to prove insolvency, § 612.

VI. RECORDS AS ADMISSIONS.

Record may be received when involving admission of party against whom it is offered, § 613.

A party may be bound by his admissions of record, § 614.

Pleadings may be received as admissions, § 615.

A demurrer may be an admission, § 616.

Certificate of clerk admissible to prove facts within his range, § 617.

I. BINDING EFFECT OF JUDGMENTS.

§ 570. JUDGMENTS are admissible in criminal prosecutions under the same conditions as in civil suits. Hence we may hold that a judgment in a criminal trial may be received in evidence for the following purposes: —

Judgment
on same
subject
binds.

(1.) *As an admission, as which it may be offered by a stranger against the party making such admission.*¹ It is true, that strictly we are not entitled to speak of the *judgment* of a *court* as the *admission* of a *party*. But when a party asks the judgment of a court, and to obtain such judgment makes a particular statement, and the judgment is based on such statement, then the court may be viewed as the agent of the party making the statement, and the judgment of the court may be imputed to the party as an admission. Hence a judgment against a party on the plea of guilty may be put in evidence against such party in subsequent proceedings to which it may be relevant.² And a plea of guilty precludes the party offering it from afterwards, in a judicial proceeding, contesting his guilt.³

(2.) *As to public rights, in respect to which a judgment is conclusive against all the world.*⁴

(3.) *As to the defendant himself, between whom and the sov-*

¹ *Infra*, § 613.

² *R. v. Fontaine Moreau*, 11 Q. B. 1035; *Bradley v. Bradley*, 2 Fairf. 367; *Green v. Bedall*, 48 N. H. 546.

³ See Whart. Cr. Pl. & Pr. § 416.

Infra, § 574; *People v. Goldstein*, 32 Cal. 432.

⁴ See Whart. on Ev. §§ 758-794.

*ereign by whom he is prosecuted a final judgment on a particular charge is conclusive.*¹ This last topic we will now proceed to develop.

§ 570 a. Where a particular section or aspect of an offence is prosecuted in a State having jurisdiction, this does not bar another prosecution of another section or aspect of the same offence in another State having jurisdiction;² nor, as will presently be seen, does a civil suit, in the name of the party injured, bar a subsequent prosecution by the sovereign.³ Nor is the fact that an issue was determined in another trial between the defendant and a private suitor, or between the sovereign and another defendant, conclusive as to persons not parties to such issue. Thus, when parties are indicted for procuring a fraudulent divorce, the prosecution may go behind the record and inquire into the merits;⁴ and on an indictment for conspiring to falsely accuse an innocent man of crime, the prosecution can go behind the record of conviction, and show that the conviction was the result of fraud.⁵ It is true that in a case decided in 1880, in Massachusetts, it was held that an indictment for obtaining money by false pretences will not lie for receiving money upon a judgment obtained upon a false representation, and false evidence of an injury.⁶ "To hold that the statute," said Colt, J., "which punishes criminally the obtaining of property by false pretences, extends to the case of a payment made by a judgment debtor in satisfaction of a judgment, when the evidence only shows that the false pretences were used to obtain a judgment, as one step towards obtaining the money, would practically make all civil actions for the recovery of damages liable in such cases to revision in the criminal courts, and subject the judgment creditor to prosecution generally for collecting a valid judgment, whether the same was paid in money or satisfied by a levy on property." But it is as much an in-

¹ On the relation of criminal to civil suits in this connection see *Duchess of Kingston's case*, 2 How. St. Tr. 538; *State v. Lang*, 63 Me. 220; *Com. v. Evans*, 101 Mass. 25; *R. v. Hartington*, 4 E. & B. 780; *Flitters v. Allfrey*, L. R. 10 C. P. 29; *Miltimore v. Miltimore*, 40 Penn. St. 151; *Hopper v. Hopper*, 19 Ill. 219.

² See Whart. Cr. Pl. & Pr. §§ 441-2.

³ *Infra*, § 575.

⁴ See Whart. Crim. Law, 8th ed. § 1362.

⁵ *Com. v. McLean*, 2 Parsons, 367.

⁶ *Com. v. Harkins*, Sup. Ct. Mass. 1880, 10 Rep. 513; *Gray, C. J., Soule, J., and Ames, J., diss.*

dictable offence to cheat by fraudulently obtaining a judgment, as it is to cheat by fraudulently obtaining a bond. It is true, it may be well argued, that a party to such a judgment must apply to the court entering it to have it opened, and until this is done he cannot resort to criminal proceedings against his adversary. But the Commonwealth of Massachusetts, in the case before us, was not a party to the judgment alleged to have been fraudulent, and could not have been heard on a motion to open it. Judgments, as we will see,¹ can be impeached collaterally for fraud, and the Commonwealth was therefore entitled to set up fraud as against the judgment alleged to have been fraudulently obtained in the case here criticised.

§ 571. To enable the proceedings in a prior prosecution to bar a subsequent prosecution, it is necessary that in the prior prosecution the court should have had jurisdiction of the offence, and the proceedings should be regular.² When two courts have concurrent jurisdiction of an entire and undivisible crime, the court first assuming such jurisdiction over a particular person or thing acquires exclusive control, and its judgments are a bar to subsequent proceedings in the ancillary tribunal.³

Jurisdiction a prerequisite to admissibility of former proceedings.

§ 572. A discharge of a defendant on proceedings preliminary to a trial is usually no bar. Thus he is not

Preliminary proceedings no bar.

¹ *Infra*, § 595.

² *Infra*, § 594; Archbold's C. P. 92; 1 Leach, 135; 2 Hawk. c. 85; *R. v. Bowman*, 6 C. & P. 337; *Stevens v. Fassett*, 27 Me. 266; *Marston v. Jenness*, 11 N. H. 156; *State v. Hodgkins*, 42 N. H. 475; *Com. v. Alderman*, 4 Mass. 477; *Com. v. Cunningham*, 13 Mass. 245; *Com. v. Peters*, 12 Met. 387; *Com. v. Bosworth*, 113 Mass. 200; *State v. Brown*, 16 Conn. 54; *State v. Cooper*, 1 Green, 361; *Com. v. Myers*, 1 Va. Cas. 188; *Bailey's case*, 1 Va. Cas. 258; *Worham v. Com.* 5 Rand. (Va.) 699; *State v. Odell*, 4 Blackf. 156; *O'Brian v. State*, 12 Ind. 369; *State v. Payne*,

4 Mo. 376; *Norton v. State*, 14 Tex. 387; *Dunn v. State*, 2 Pike, 229.

³ Whart. Conf. of L. § 933; U. S. *v. Pirates*, 5 Wheat. 184; *Robinson, ex parte*, 6 McLean, 355; *Com. v. Goddard*, 13 Mass. 455; *State v. Davis*, 1 South. 311; *Trittip v. State*, 10 Ind. 343; *Mize v. State*, 49 Ga. 375; *State v. Simons*, 3 Mo. 415; *Burdett v. State*, 9 Tex. 43; though see *State v. Tisdale*, 2 Dev. & Bat. 159.

That a plurality of governments may prosecute an offence having a plurality of aspects see Whart. Cr. Pl. & Pr. § 443. The authorities are collected in Whart. Crim. Law, 8th ed. §§ 264 *et seq.*

protected from a subsequent prosecution by an *ignoramus* from a grand jury,¹ nor by a discharge on *habeas corpus*.²

§ 573. Nor is a *nolle prosequi* ordinarily a bar;³ nor, in Massachusetts, is a dismissal by the trial court;⁴ though it is otherwise where a *nolle prosequi* is entered when the jury is empanelled, and the case is committed to them finally, and then withdrawn without consent of the defendant, and without order of court or statutory power; or when, even if the court approve the entry, the defendant was at the time in jeopardy, under the Constitution.⁵ But when the *nolle prosequi* is with permission of the court, it may be no bar, even though the case is opened to the jury.⁶ After verdict a *nolle prosequi* may operate as a pardon.⁷

¹ Whart. Cr. Pl. & Pr. § 446; 2 Hale, 243-6; 2 Hawk. c. 85, s. 6; R. v. Newton, 2 M. & R. 503; Com. v. Miller, 2 Ashm. 61. See Christmas v. State, 53 Ga. 81.

² Whart. Cr. Pl. & Pr. §§ 445, 1011. See, however, under South Carolina statute, State v. Fley, 2 Brev. 338.

³ Whart. Cr. Pl. & Pr. § 447; U. S. v. Stowell, 2 Curtis C. C. 170; Com. v. Wheeler, 2 Mass. 172; Com. v. Tuck, 20 Pick. 356; Bacon v. Towne, 4 Cush. 234; State v. Main, 31 Conn. 572; Wortham v. Com. 5 Rand. (Va.) 699; State v. McNeil, 3 Hawks, 183; State v. McKee, 1 Bail. 651; State v. Haskins, 3 Hill (S. C.), 95; State v. Blackwell, 9 Ala. 79; Aaron v. State, 39 Ala. 75; Winston, ex parte, 52 Ala. 419; Clark v. State, 23 Miss. 261; Donaldson v. State, 44 Mo. 149. See R. v. Roper, 1 Craw. & Dix, 93; Com. v. Drew, 3 Cush. 279; People v. Vanhorne, 8 Barb. 160; Gardner v. People, 6 Parker C. R. 155; State v. Tisdale, 2 Dev. & Bat. 159; State v. Thornton, 13 Ired. 256; State v. Colvin, 11 Humph. 599. For other cases see Whart. Cr. Pl. & Pr. § 449.

⁴ Com. v. Gould, 12 Gray, 171; Com. v. Bressant, 126 Mass. 246.

⁵ U. S. v. Shoemaker, 2 McLean, 114; State v. Smith, 49 N. H. 155; State v. Roe, 12 Vt. 941; Com. v. Tuck, 20 Pick. 356; Com. v. Kimball, 7 Gray, 328; People v. Barrett, 2 Caines, 304; People v. Vanhorne, 8 Barb. 158; McFadden v. State, 23 Penn. St. 12; Mounts v. State, 14 Ohio, 295; Baker v. State, 12 Oh. St. 214; Reynolds v. State, 3 Kelly, 53; Weinzorpfli v. State, 7 Blackf. 186; Harker v. State, 8 Blackf. 540; Wright v. State, 5 Ind. 290; State v. McKee, 1 Bailey, 651; Jones v. State, 55 Ga. 625; State v. Kreps, 8 Ala. 951; Cobia v. State, 16 Ala. 781; Grogan v. State, 44 Ala. 9; Barnett v. State, 54 Ala. 579; Ward v. State, 1 Humph. 253; State v. Connor, 5 Cold. 311. See R. v. Oulaghan, Jebb, 270. As to special Massachusetts statute see Rev. Stat. c. 136, § 27; c. 198, § 1; Sup. Rev. Stat. 387.

⁶ U. S. v. Morris, 1 Curtis C. C. 23; State v. Morgan, 33 Md. 44.

⁷ State v. Whittier, 38 Me. 574; Roe v. State, 12 Vt. 93; Com. v. Briggs, 7 Pick. 177; Com. v. Tuck, 20 Pick. 356; Com. v. Jenks, 1 Gray, 490; People v. Van Brunt, 8 Barb.

§ 574. It is not necessary that a judgment should have been entered on a verdict of acquittal to make such acquittal an estoppel.¹ An outstanding verdict of guilty may estop, even without a judgment,² and so where there is a plea of guilty without judgment;³ though it is otherwise where the indictment is conceded to be bad by the prosecution,⁴ and where the indictment on which the proceedings are had is stolen,⁵ and where the defendant asks for a new trial. But "jeopardy" may constitute a bar.⁶

Verdict of acquittal without judgment a bar. Otherwise with conviction.

§ 575. Proceedings in a criminal prosecution will not be barred by the fact that a prior civil suit has been instituted for the same cause of action, as in such cases the parties are not the same;⁷ though a court will take into consideration the civil procedure in adjusting sentence on the criminal.⁸

Prior civil proceedings no bar.

§ 576. It is not necessary that a judgment, to be a bar, should be that of a court of common law jurisdiction. The judgment of a military court, or a court-martial, if competent and constitutional, may likewise establish *res judicata*.⁹ But ordinarily an offence against a State is not barred by the action of a federal court-martial,¹⁰ nor is a court-

Rulings of military courts final.

158; *State v. Fleming*, 7 Humph. 152. See generally, as to *nolle prosequi*, Whart. Cr. Pl. & Pr. §§ 383, 447.

¹ *West v. State*, 2 Zab. 212. See infra, § 609. For other cases see Whart. Cr. Pl. & Pr. § 435. And compare supra, § 570.

² Whart. Cr. Pl. & Pr. § 435; *U. S. v. Herbert*, 5 Cranch C. C. 87; *U. S. v. Keen*, 1 McLean, 429; *State v. Elden*, 41 Me. 165; *Ratzky v. People*, 29 N. Y. 124; *Shepherd v. People*, 11 E. P. Smith, 407; *West v. State*, 2 Zab. 212; *Preston v. State*, 25 Miss. 383; *State v. Spear*, 6 Mo. 644; *Lewis v. State*, 1 Tex. Ap. 323.

³ *People v. Goldstein*, 32 Cal. 432. See *State v. Lang*, 63 Me. 220. Infra, § 577.

⁴ *Penn. v. Huffman*, Addis. 140.

⁵ *State v. Mounts*, 14 Ohio, 295.

⁶ See *Com. v. Cook*, 6 S. & R. 577;

Com. v. Clue, 3 Rawle, 498; *McCreary v. Com.* 29 Penn. St. 323; *Com. v. Fells*, 9 Leigh, 613; *Spier's case*, 1 Dev. 491; and see cases in Whart. Cr. Pl. & Pr. § 436.

⁷ See cases cited in Whart. Cr. Pl. & Pr. § 453.

⁸ See *R. v. Rhodes*, 2 Strange, 703; *State v. Frost*, 1 Brev. 385; *Buckner v. Beck*, Dudley (S. C.), 168; *State v. Blennerhasset*, 1 Walker, 7.

Whether the injured party is bound to prosecute criminally before having resort to civil proceedings is elsewhere considered. Whart. Cr. Pl. & Pr. § 453.

⁹ Whart. Cr. Pl. & Pr. § 439; *Dynes v. Hoover*, 20 How. 65; *Woolley v. U. S.* 20 Law Rep. 631; *U. S. v. Reiter*, 4 Am. Law Reg. N. S. 534.

¹⁰ *State v. Rankin*, 4 Cold. 143.

martial barred by a state prosecution for the same offence in its state aspects.¹ Where, however, a court-martial has, by law, exclusive jurisdiction to try an offence, then its judgment is a bar to the proceedings of other tribunals.²

§ 577. A judgment founded on a plea of *nolo contendere* is a conclusive bar to a subsequent criminal prosecution,³ though in civil suits *nolo contendere* is held not to involve an admission of guilt.⁴

§ 578. Illustrations of the rule that the offences must be identical, in order to enable an acquittal or conviction on a former trial to be received in evidence to bar proceedings on a second trial, belong more properly to the accompanying Treatise on Pleading.⁵ It may, however, be here mentioned that an acquittal on ground of misnomer of third parties or of things is no bar to a second indictment for the same offence accurately describing the third parties or things,⁶ nor is

¹ See 3 Op. Atty. Gen. 750; 6 Ibid. 418. See supra, § 571; U. S. v. Cashiel, 1 Hughes, 552.

² Coleman v. State, 97 U. S. 509. For other cases see Whart. Cr. Pl. & Pr. § 439.

In Coleman v. State, 97 U. S. 509, the defendant, while in the military service of the United States during the civil war, was convicted in Tennessee by a court-martial, and sentenced to suffer death. The sentence, for some cause unknown, was not carried into effect. After restoration of federal authority in Tennessee, he was indicted by a Tennessee court for the same murder. To the indictment he pleaded his conviction before the court-martial. The plea being overruled, he was tried, convicted, and sentenced to death. It was held by the Supreme Court of the United States that the state court had no jurisdiction to try him for the offence, as he was at the time answerable only to the federal government, and only by its laws, as enforced by its armies, could he be punished. It was fur-

ther ruled that unless suspended or superseded by the commander of the forces of the United States which occupied Tennessee, the laws of that State, so far as they affected its inhabitants among themselves, remained in force during the war, and over them, its tribunals, unless superseded by him, continued to exercise their ordinary jurisdiction.

³ State v. Lang, 63 Me. 220; Whart. Cr. Pl. & Pr. § 418.

⁴ Com. v. Horton, 9 Pick. 206; Com. v. Tilton, 8 Met. 232.

⁵ See Whart. Cr. Pl. & Pr. §§ 456 et seq.

⁶ Ibid. § 460; 2 Hale, 247; R. v. Cogan, 1 Leach, 443; R. v. Green, Dears. & B. 113; R. v. Champneys, 2 M. & R. 26; State v. Sias, 17 N. H. 558; Com. v. Wade, 17 Pick. 395; Com. v. Sutherland, 109 Mass. 342; Com. v. Trimmer, 84 Penn. St. 18; Burres v. Com. 27 Grat. 934; Durham v. People, 4 Scam. 172; State v. Risher, 1 Rich. 217; Davis v. State, 58 Ga. 173; Martha v. State, 26 Ala. 72; State v. McGraw, 1 Walker, 208;

an acquittal on account of a wrong venue a bar to an indictment in which the right venue is laid ;¹ nor is an acquittal on ground of a false allegation of time, in cases where time is essential, a bar to a subsequent indictment giving the time correctly.² It is of course otherwise when the averment of time is immaterial.³ A conviction, on the other hand, on an indictment defective for either of the above reasons, followed by an endurance of sentence, bars further proceedings.⁴

§ 579. When the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first, then the first procedure operates as an estoppel ; but not otherwise.⁵ Hence an acquittal on a defective or inadequate indictment is no bar ;⁶ but it is otherwise as to a conviction on a defective indictment, followed by an endurance of the sentence.⁷ In conformity with the general principle above stated, after judgment has been arrested or reversed on a defective indictment, or after an indictment has been quashed, or after a judgment has been entered for the defendant on demurrer, a new indictment may be found correcting the defects in the prior indictment, and to the second indictment the proceedings under the first will be no bar.⁸ But an erroneous acquittal (if

When evidence in second case is sufficient to secure a judgment in first, then first judgment estops.

Hite v. State, 9 Yerg. 357. *Supra*, §§ 91 *et seq.*

¹ *Vaux's case*, 4 Co. 45 a, 46 b ; *Methard v. State*, 19 Oh. St. 363. *Supra*, § 107.

² *R. v. Taylor*, 3 B. & C. 502. *Supra*, § 106.

³ *Supra*, § 103 ; 2 Hale, 179, 244 ; 2 Hawk. 35.

⁴ *Com. v. Loud*, 8 Met. 328 ; *Com. v. Keith*, 8 Met. 531 ; *Fritz v. State*, 40 Ind. 18 ; *Durham v. People*, 4 Scam. 172.

⁵ Whart. Cr. Pl. & Pr. §§ 456 *et seq.* ; *R. v. Sheen*, 2 C. & P. 634 ; *R. v. Clark*, 1 Brod. & B. 478 ; *R. v. Emden*, 9 East, 487 ; *R. v. Vandercomb*, 2 Leach, 708 ; *Heikes v. Com.* 26 Penn. St. 513.

⁶ Whart. Cr. Pl. & Pr. § 457 ;

Vaux's case, 4 Co. 44 ; *Com. v. Clair*, 7 Allen, 525 ; *People v. Barrett*, 1 Johns. 66 ; *Com. v. Somerville*, 1 Va. Cas. 164 ; *Price v. State*, 19 Ohio, 423 ; *Mount v. Com.* 2 Duvall, 98 ; *Black v. State*, 36 Ga. 447 ; *Whitley v. State*, 38 Ga. 50 ; *Waller v. State*, 40 Ala. 325 ; *State v. McGraw*, Walker, 208 ; *Munford v. State*, 39 Miss. 558 ; *State v. Horneman*, 16 Kans. 452.

⁷ *Com. v. Loud*, 8 Met. 328 ; *Com. v. Keith*, 8 Met. 531 ; *Fritz v. State*, 40 Ind. 18.

⁸ *Writhpole's case*, Cro. Car. 147 ; *R. v. Drury*, 3 Cox C. C. 544 ; *R. v. Houston*, 3 Craw. & Dix, 310 ; *R. v. Wildey*, 1 M. & S. 188 ; *Com. v. Gould*, 12 Gray, 171 ; *People v. Casborus*, 13 Johns. 351 ; *Com. v. Zepp*, 5 Penn. L. J. 256 ; *Cochrane v. State*, 6 Md. 400 ;

not fraudulent) is conclusive, so that the defendant cannot be retried for any offence of which he could have been convicted under the indictment on which he was acquitted.¹

§ 580. Wherever an unlawful act has two aspects, under either of which it is indictable, and the evidence of either of which would sustain an indictment for the other, then an indictment for one aspect absorbs the case, and there can be no further prosecution for the act. In other words, when the evidence necessary to support the second indictment would have supported the first, the second is barred by a conviction or acquittal on the first; though not otherwise.² Thus where a riot consists of a series of tumultuous assaults, the defendant, after being convicted of the riot, cannot be put on trial for the constituent assaults;³ nor, when a riot consists in breaking up a religious meeting, can the defendant be prosecuted for the two offences successively;⁴ nor after a conviction for holding forged paper, under an indictment for

Com. v. Hatton, 3 Grat. 623; *State v. Ray*, 1 Rice, 1; *State v. Phil*, 1 Stew. 31; *Turner v. State*, 40 Ala. 21; *Jeffries v. State*, 40 Ala. 381. *Infra*, § 582. For other cases see *Whart. Cr. Pl. & Pr.* § 457.

¹ 2 Inst. 318; 2 Hale, 274; *R. v. Sutton*, 5 B. & Ad. 52; *R. v. Praed*, 4 Burr. 2257; *R. v. Mann*, 4 M. & S. 337; *State v. Kittle*, 2 Tyler, 471; *State v. Brown*, 16 Conn. 54; *People v. Maher*, 4 Wend. 229; *State v. Taylor*, 1 Hawks, 264; *Black v. State*, 36 Ga. 547; *State v. Dark*, 8 Blackf. 526; *State v. Norvell*, 2 Yerg. 24; *Slaughter v. State*, 6 Humph. 410.

² Archbold's C. P. by Jervis, 82; 1 Leach, 448; *R. v. Embden*, 9 East, 437; *Com. v. Cunningham*, 13 Mass. 245; *Com. v. Bakeman*, 105 Mass. 53; *Com. v. Wade*, 17 Pick. 395; *Com. v. Tenney*, 97 Mass. 50; *People v. Barrett*, 1 Johns. 66; *Canter v. People*, 38 How. (N. Y.) Pr. 91; *State v. Reed*, 12 Md. 263; *Price v. State*, 19 Ohio, 423; *Gerard v. People*, 3 Scam. 363;

Durham v. People, 4 Scam. 42; *Guedel v. People*, 43 Ill. 226; *State v. Egglesht*, 41 Iowa, 574; *State v. Ray*, 1 Rice, 1; *State v. Risher*, 1 Rich. 217; *State v. Revels*, Busbee, 120; *Holt v. State*, 38 Ga. 187; *Hite v. State*, 9 Yerg. 357; *State v. Keogh*, 13 La. An. 243. See, to same effect, 2 N. Y. Rev. St. 1856. Other cases will be found in *Whart. Cr. Pl. & Pr.* § 471.

³ *R. v. Champneys*, 2 M. & R. 26; *Com. v. Kinney*, 2 Va. Cas. 139; *Smith v. Com.* 7 Grat. 593; *State v. Stanly*, 4 Jones (N. C.), 290; *State v. Fife*, 1 Bailey, 1; *State v. Standifer*, 5 Porter, 523. See *Com. v. Hawkins*, 11 Bush, 603; though see *Scott v. U. S.* 1 Morris, 142; and cases in *Whart. Cr. Pl. & Pr.* § 471.

⁴ *State v. Townsend*, 2 Harring. 543. A conviction of an assault, however, does not bar a prosecution for riot to which the assault was collateral. See *Skidmore v. Bricker*, 77 Ill. 164.

holding and uttering such paper, can there be a conviction for uttering the paper.¹ But a conviction of larceny, on an indictment for larceny, does not bar a prosecution for the burglary with intent to steal to which the larceny was an incident;² nor does an acquittal for larceny bar a prosecution for obtaining the same goods by false pretences or by conspiracy,³ nor, at common law, for being an accessory to the stealing.⁴ In some instances courts have undertaken to say that when a prosecution elects to prosecute a particular phase of an offence (*e. g.* larceny in a case of robbery,⁵ or arson in a case where the burning caused killing,⁶ or one of a series of municipal negligences occurring on the same day;⁷ this is an adequate determination and satisfaction, and the case, on the particular evidence, ought to be pushed no further. But whether public justice demands a second prosecution, in such cases, is a question for the executive, who may properly step in and prevent an undue accumulation of prosecutions. For the court the test is, whether, on the first trial, there could have been a conviction of the offence prosecuted in the second. If not, then the rule *ne bis idem* does not apply.⁸

¹ *State v. Benham*, 7 Conn. 414; *People v. Van Keutzen*, 5 Park. C. R. 66. See *People v. Allen*, 1 Park. C. R. 445; *State v. Egglesht*, 41 Iowa, 574. Otherwise as to stealing and receiving, and as to forging and uttering. *Foster v. State*, 39 Ala. 229; *Harrison v. State*, 36 Ala. 248. As to forging a claim on one bank, and obtaining money on such claim from another bank, see *People v. Ward*, 15 Wend. 231; Whart. Cr. Pl. & Pr. §§ 465 *et seq.*

² See *Wilson v. State*, 24 Conn. 57; *State v. Warner*, 14 Ind. 572; but see *State v. Lewis*, 2 Hawks, 98; *Roberts v. State*, 14 Ga. 8.

³ *R. v. Henderson*, C. & M. 328; *State v. Sias*, 17 N. H. 558; *Dominick v. State*, 40 Ala. 680.

⁴ *State v. Larkin*, 49 N. H. 36; *Foster v. State*, 39 Ala. 229. See, for a fuller discussion, Whart. Cr. Pl. & Pr. § 471.

⁵ *State v. Lewis*, 2 Hawks, 98. See *Roberts v. State*, 14 Ga. 8.

⁶ *State v. Cooper*, 1 Green (N. J.), 361; *People v. Smith*, 3 Weekly Dig. 162; cited 13 Eng. Rep. 659. See an able criticism on these cases in 13 Eng. Rep. 659-60.

⁷ *State v. Fayetteville*, 2 Murph. 371. See *Fiddler v. State*, 7 Humph. 508.

In Pennsylvania, under a statute forbidding the employment of young girls in liquor saloons, it is held that the act of employment being a single offence, there is no misjoinder in not entering a separate indictment for each female so employed. So also in imposing a fine of \$800, the minimum punishment prescribed in the act, \$100 for each female employed, there being no misjoinder there was no error in the sentence. *Walter v. Com.* 88 Penn. St. 137.

⁸ See, for a fuller discussion, Whart. Cr. Pl. & Pr. §§ 465 *et seq.*

§ 581. Prosecutions under the liquor laws afford us several illustrations to the same effect. A conviction, for instance, of the offence of keeping a tippling-house, or of being a common seller, does not bar a prosecution for individual sales;¹ and a conviction for nuisance will not bar a prosecution for keeping intoxicating liquor.² But a prosecution for a particular sale bars a subsequent prosecution for the same sale, though the indictments in the two cases are under distinct statutes, or sections of statutes.³

§ 582. It may be that the defendant was previously prosecuted for the same offence as that under trial, but, on a plea of abatement offered by him, had a verdict in his favor. If so, the record of the former trial is inadmissible, since on that trial the defendant could not have been convicted on the evidence adduced on the second trial. The former proceedings do not bar a subsequent indictment giving his right name.⁴

§ 583. Wherever a description is material, and an acquittal follows from a variance in respect to such description, such acquittal, as we have seen, is not admissible on the trial of a second indictment in which the averments are correctly made. It is otherwise when the description was not of the essence of the offence, in which case, where the defendant could have been convicted on the first trial on the evidence admissible on the second, proceedings on the second trial are concluded by acquittal or conviction on the first.⁵

§ 584. Wherever a minor offence is enclosed in a major, then, if the two be contained in the same count, either an acquittal or conviction of the minor, is admissible as a

¹ Whart. Cr. Pl. & Pr. § 472; State v. Coombs, 32 Me. 527; State v. Maher, 35 Me. 225; State v. Innes, 53 Me. 536; Com. v. Cutler, 9 Allen, 486; Com. v. Kennedy, 97 Mass. 224; State v. Johnson, 3 R. I. 94; Heikes v. Com. 26 Penn. St. 513; Roberts v. State, 14 Ga. 8; Morman v. State, 24 Miss. 54. See *contra*, State v. Nutt, 28 Vt. 598; Miller v. State, 3 Oh. St. 475.

² Com. v. McCauley, 105 Mass. 69. See State v. Innes, 53 Me. 536; Com. v. Hardiman, 9 Allen, 487; State v. William, 1 Vroom, 102.

³ Ibid.; State v. Nutt, 28 Vt. 598; Miller v. State, 3 Oh. St. 475. Further distinctions are stated in Whart. Cr. Pl. & Pr. § 472.

⁴ Supra, § 94; infra, § 639.

⁵ Supra, §§ 91 *et seq.*, 578.

bar to a subsequent indictment for the major offence.¹ On an indictment for murder, for instance, if the jury convicts of manslaughter, this is a virtual acquittal of murder, and the case cannot be retried on an indictment for murder.² A conviction, also, of murder in the second degree is a bar to a prosecution for murder in the first degree.³ On the same reasoning, a defendant convicted of an assault, on an indictment for an assault and battery, or for an assault with intent to kill, cannot afterwards be tried for the assault and battery, or the assault with intent to kill;⁴ and a defendant convicted of an assault with intent to ravish, under an indictment for rape, cannot be subsequently tried for the rape.⁵ And it has been held that a defendant convicted of a breach of the peace cannot afterwards be tried for an assault of which the breach of the peace was an ingredient.⁶

fence enclosed in major admissible on subsequent trial of major.

§ 585. If, however, there could have been no conviction, on the first trial, of the major offence, then, on a subsequent trial of the major offence, the record of the first

Otherwise when there could be

¹ *R. v. Oliver*, 8 Cox C. C. 384; *R. v. Yeadon*, 9 Cox C. C. 91; *R. v. Bird*, T. & M. 437; 2 Den. C. C. 94; 5 Cox C. C. 11; *State v. Waters*, 39 Me. 54; *State v. Dearborn*, 54 Me. 442; *Com. v. Griffin*, 21 Pick. 523; *Stewart v. State*, 5 Ohio, 242; *State v. Wiles*, S. C. Min. 9 Rep. 472; *Swinney v. State*, 8 Sm. & M. 576; *State v. Chaffin*, 2 Swan, 492; *Miller v. State*, 58 Ga. 200; *State v. De Laney*, 28 La. An. 434; *Cameron v. State*, 8 Eng. (Ark.) 712; *State v. Taylor*, 3 Oregon, 10. See *supra*, §§ 130, 144; and see Whart. Cr. Pl. & Pr. § 465, for other cases.

² 2 Hale, 246; Fost. 329; *Livingston's case*, 14 Grat. 592; *Brennan v. People*, 15 Ill. 511; *Barnett v. People*, 54 Ill. 325; *Jordan v. State*, 22 Ga. 545; *Hurt v. State*, 25 Miss. 378; *State v. Ross*, 29 Mo. 32; *Slaughter v. State*, 6 Humph. 410; *State v. Lessing*, 16 Minn. 80; *State v. Martin*, 30 Wis. 216; *People v. Gilmore*, 4 Cal. 376. See, however, *U. S. v.*

Harding, 1 Wall. Jr. 147; *State v. Beheimer*, 20 Oh. St. 579; and see other cases in Whart. Cr. Pl. & Pr. § 465.

³ *Lewis v. State*, 51 Ala. 1; *Fields v. State*, 52 Ala. 348; *State v. Smith*, 53 Mo. 139; *Slaughter v. Com.* 6 Humph. 410; *Johnson v. State*, 29 Ark. 31.

⁴ Whart. Cr. Pl. & Pr. § 465; *State v. Dearborn*, 54 Me. 442; *State v. Hardy*, 47 N. H. 538; *State v. Coy*, 2 Aiken, 181; *State v. Reed*, 40 Vt. 603; *State v. Johnson*, 1 Vroom, 185; *Francisco v. State*, 4 Zab. 80; *Stewart v. State*, 5 Ohio, 242; *Clark v. State*, 12 Ga. 131; *State v. Stedman*, 7 Porter, 495; *Carpenter v. State*, 23 Ala. 84; *Reynolds v. State*, 11 Tex. 120; *State v. Robey*, 8 Nev. 312; *People v. Apgar*, 35 Cal. 389.

⁵ *State v. Shepherd*, 7 Conn. 54.

⁶ *Com. v. Miller*, 5 Dana, 320; *Com. v. Hawkins*, 11 Bush, 603. See fully for other cases Whart. Cr. Pl. & Pr. § 465.

no conviction on first trial of major offence.

prosecution of the minor offence is not admissible.¹ Thus, acquittal for an assault with intent to kill or ravish (the acquittal being on the ground of merger) is no bar to a subsequent indictment for the consummated offence;² and a conviction of an assault with intent to kill is no bar to a subsequent prosecution for murder, the person assaulted having intermediately died.³ It should be also observed, that it has been argued that if the major offence could have been included in the first prosecution, but was omitted either negligently or wilfully, and if the facts constituting the major or more aggravated offence were put in evidence on the first trial, then there can be no second trial for such offence.⁴ But as a general rule we must fall back on the proposition already stated, that if there could have been no conviction of the major offence on the former indictment, then judgment on such indictment cannot estop a subsequent indictment for the major offence.

§ 586. A previous prosecution on an indictment including minor and major offence, bars a subsequent prosecution for the

¹ Whart. Cr. Pl. & Pr. § 465; R. v. Morris, L. R. 1 C. C. 90; R. v. Salvi, 10 Cox C. C. 481, n.; R. v. Button, 11 Q. B. 929; Josslyn v. Com. 6 Met. 236; Com. v. Evans, 101 Mass. 25; Com. v. Herty, 109 Mass. 348; Wilson v. State, 24 Conn. 57; State v. Warner, 14 Ind. 572; Freeland v. People, 16 Ill. 380; Severin v. People, 37 Ill. 414; Scott v. U. S. 1 Morris, 142; People v. Knapp, 26 Mich. 112; State v. Martin, 30 Wis. 216; Duncan v. Com. 6 Dana, 295.

² Whart. Cr. Pl. & Pr. §§ 456, 465; State v. Murray, 15 Me. 100; Com. v. Kingsbury, 5 Mass. 106; People v. Mather, 4 Wend. 265. See Com. v. Parr, 5 W. & S. 345.

³ R. v. Morris, L. R. 1 C. C. 90; R. v. Salvi, 10 Cox C. C. 481, n.; Com. v. Evans, 101 Mass. 25; Burns v. People, 1 Parker C. R. 182; Wright v. State, 5 Ind. 527. Supra, § 570.

⁴ R. v. Elrington, 9 Cox C. C. 86; 1 B. & S. 689; 10 W. R. 13; citing R. v. Stanton, 5 Cox C. C. 324; Thompson,

in re, 9 W. R. 203; R. v. Champneys, 2 M. & R. 26; State v. Smith, 43 Vt. 324; State v. Stanly, 4 Jones (N. C.), 290; though see Smith v. Com. 7 Grat. 593. For other authorities see Whart. Cr. Pl. & Pr. § 407.

The English rulings, it should be observed, rest in part on a special recent statute providing that after a trial by justices there shall be no further proceedings "for the same cause."

In R. v. Tancock, 13 Cox C. C. 217, where the defendant was indicted for murder, and pleaded a former conviction for manslaughter for the same act, on an indictment for manslaughter, Denman, J., held that as the case on trial amounted only to manslaughter, the former conviction was a bar; though he expressed a doubt whether if the second trial disclosed a case of murder, the former conviction of manslaughter would be a bar. See comments in Whart. Cr. Pl. & Pr. § 465.

minor offence. Thus a conviction or acquittal on an indictment for murder bars a subsequent prosecution for manslaughter; a conviction or acquittal on an indictment for burglary and larceny bars a subsequent prosecution for larceny.¹ It is otherwise when there could not have been a conviction of the minor offence under the first indictment.² Thus an acquittal for burglary with intent to steal does not bar a prosecution for larceny;³ and an acquittal for murder on the ground that the assaults averred did not contribute to the murder does not bar a subsequent indictment for the assaults.⁴

In prosecution for minor offence, it is admissible to put in evidence former prosecution of case containing major and minor.

§ 587. Is it permissible to introduce into one indictment the killing by A. of B. and C. simultaneously; and if so, can the two killings be tried together, and a verdict found so as to include both? That this can be done is expressly ruled by several courts;⁵ but the tendency of authority is to the contrary,⁶ and with reason. It

When two are simultaneously killed by one blow, a prosecution for killing one

¹ 4 Co. R. 45; 2 Hale, 246; Fost. 339; R. v. Barrett, 9 C. & P. 387; People v. McGowan, 17 Wend. 386; People v. Loop, 3 Parker C. R. 561; Lohman v. People, 1 Comst. 379; State v. Cooper, 1 Green, 361; Dinkey v. Com. 17 Penn. St. 126; State v. Reed, 12 Md. 263; State v. Lewis, 2 Hawks, 98; Johnson v. State, 44 Ga. 253; State v. Smith, 15 Mo. 550; State v. Keogh, 13 La. An. 243; Wilcox v. State, 31 Tex. 586. See for other cases Whart. Cr. Pl. & Pr. § 466.

² Hawks. b. ii. c. 25, s. 5; 1 Leach, 12; R. v. Henderson, C. & M. 328; State v. Warner, 14 Ind. 572; State v. Jesse, 3 Dev. & B. 98; State v. Standifer, 5 Porter, 523; State v. Wightman, 26 Mo. 515. See, however, R. v. Gould, 9 C. & P. 364.

³ State v. Warner, 14 Ind. 572; Roberts v. State, 14 Ga. 8.

⁴ R. v. Bird, T. & M. 437; 2 Den. C. C. 94; 5 Cox C. C. 11. See *supra*, §§ 91-3.

⁵ State v. Womack, 7 Cold. 508; Rucker v. State, Sup. Ct. Tex. 1880, 9 Rep. 525; and so Clem v. State, 42 Ind. 420.

⁶ See authorities in Whart. Crim. Law, 8th ed. § 468; R. v. Champneys, 2 M. & R. 26; R. v. Jennings, R. & R. 388; State v. Damon, 2 Tyler, 390; Com. v. Bakeman, 105 Mass. 53; State v. Benham, 7 Conn. 414; People v. Warren, 1 Parker C. R. 338; Vaughan v. Com. 2 Va. Cas. 273; Smith v. Com. 7 Grat. 593; State v. Fife, 1 Bailey, 1; State v. Fayetteville, 2 Murphy, 371; State v. Standifer, 5 Porter, 523; Teat v. State, 53 Miss. 439; People v. Alibez, 49 Cal. 452.

In State v. Horneman, 16 Kans. 452, it was held that an acquittal on a charge of shooting with intent to kill was no bar to a prosecution, based on the same act, for wounding a horse.

is not
barred by
a prosecu-
tion for
killing the
other.

by no means follows that because two persons are killed simultaneously by the same blow, the issue as to each is the same.¹ A., for instance, shooting at B. in self-defence, may negligently kill C., in which case an acquittal on an indictment for killing B. would not bar an indictment for killing C. Or A., an officer of justice, when killing B. under legal warrant negligently kills C., in which case an acquittal for killing B. would not bar a prosecution for killing C. Or A. designing to poison B., by the same poison, at the same meal, negligently poisons C., in which case a verdict of manslaughter as to C. would not bar an indictment for the murder of B. Even if we follow the cases which rule that when a second person is killed incidentally to an assault on a first, the offence is to be viewed in respect to the second person precisely as if he were the first,² yet the question still arises, which is the person assaulted whose relations are to be imputed to the other person killed, and how, if both were killed, can a lumping sentence be imposed?³

§ 588. It is not only proper but right, where a number of articles having a common ownership are stolen simultaneously, that they should be grouped in the same indictment;⁴ from which it follows that on an indictment for stealing the goods of A. it is admissible to put in evidence, in bar, a prior prosecution for the stealing at the same time other goods of A. If the prosecution did not lump all the goods stolen in the first indictment, it was its own fault; and it cannot avail itself of its own negligence to multiply indictments against the defendant.

¹ See this question discussed more fully in Whart. Cr. Pl. & Pr. § 468.

² See Whart. Crim. Law, 8th ed. § 120.

³ See *People v. Warren*, 1 Parker C. R. 338; *Vaughan v. Com.* 2 Va. Cas. 273; *Smith v. Com.* 7 Grat. 593.

⁴ *R. v. Carson*, R. & R. 303; *Furneaux's case*, R. & R. 335; *State v. Snyder*, 50 N. H. 150; *State v. Cameron*, 40 Vt. 555; *Com. v. Williams*, 2 Cush. 583; *Com. v. O'Connell*, 12 Allen, 451; *Com. v. Eastman*, 2 Gray,

76; *Jackson v. State*, 14 Ind. 327; *State v. Williams*, 10 Humph. 101; *Lorton v. State*, 7 Mo. 55; *Hatch v. State*, 6 Tex. App. 384. See other cases cited Whart. Cr. Pl. & Pr. § 470. See also *State v. Egglesht*, 41 Iowa, 574, where it was held that when by one act several forged checks were uttered, these utterings formed but one offence. Compare *Walter v. Com.* 88 Penn. St. 137, cited *supra*, § 580.

But a more difficult question arises where articles simultaneously stolen belong to different owners, in which case it is argued that because each owner is entitled to restitution, he cannot be precluded from this by a proceeding as to which he may not have had notice, and that therefore several stealings from different owners cannot be grouped in the same indictment.¹ This conclusion, however, has been rejected by several courts, and the preponderating opinion is, that when there is a taking of the articles of several owners by a single act, the prosecution may elect to indict for all the articles together.² If so, on the reasoning already given, by indicting for stealing a single article, it may preclude itself from a further prosecution of the transaction.³

§ 589. It must be remembered, in view of the terms of the present discussion, that to constitute simultaneousness it is not necessary that there should be exact coincidence in a particular point of time. It may appear, for instance, that the defendant has tapped his neighbor's gas-pipe, and has for weeks been consuming his neighbor's gas. This, however, will not justify a series of prosecutions for each day's or each hour's appropriation. The tapping with the subsequent appropriations constitute one act, and must be prosecuted as such.⁴ The same reasoning applies to the removal, piece by piece, of ore from a neighboring quarry, by an orifice made at one specific time.⁵ And it has been held that the setting on fire a block of houses constitutes a simultaneous offence, though the houses take fire and are consumed at successive periods of time.⁶

"Simultaneous" does not mean coincidence in a point of time.

¹ *R. v. Knight*, L. & C. 378; *State v. Newton*, 42 Vt. 537; *Com. v. Andrews*, 2 Mass. 409; *State v. Thurston*, 2 McMull. 382.

² *Com. v. Williams*, Thach. C. C. 722; *State v. Nelson*, 29 Me. 329; *State v. Merrill*, 44 N. H. 624; *Com. v. Dobbin*, 2 Parsons, 380; *State v. Hennessy*, 23 Oh. St. 339; *Lowe v. State*, 57 Ga. 171; *Ben v. State*, 22 Ala. 9; *Lorton v. State*, 7 Mo. 55; *State v. Morphin*, 37 Mo. 378; *Wilson v. State*, 45 Tex. 170. See U. S. *v. Beerman*, 5 Cranch C. C. 412; and

see discussion in Whart. Cr. Pl. & Pr. § 470.

³ That a prosecution may be barred by selecting a particular grade see *supra*, § 580.

⁴ *R. v. Firth*, L. R. 1 C. C. 172; 11 Cox C. C. 234. See *R. v. Jones*, 4 C. & P. 217; Whart. Cr. Pl. & Pr. § 474.

⁵ *R. v. Bleasdale*, 2 C. & K. 765.

⁶ *Woodford v. People*, 62 N. Y. 117; *aff. S. C.*, 3 Hun, 310; 5 Thomp. & C. 539.

§ 590. In view of the comparative lightness of the offence, and the power residing in the courts to modify the sentence according to the evidence, it has been frequently held admissible for the prosecution, when there have been simultaneous batteries on several persons, to include these batteries in the same count. It follows from this that on a trial for one of these batteries it is admissible for the defendant to show, in bar of the indictment, that he has been previously prosecuted for a simultaneous battery on another person, the indictment in the first case averring the double battery.¹ But it is otherwise when the indictment in the first case charged simply a battery on a person other than the prosecutor in the second suit.²

§ 591. A question of much moment arises when there are a series of successive offences relating to the same transaction. It will not be pretended that an acquittal or conviction for a nuisance to-day will be a bar to a prosecution for a similar nuisance on the same premises to-morrow.³ Nor would it be maintained that a judgment for the plaintiff for yesterday's nuisance would be conclusive in a suit for to-day's nuisance.⁴ Nor, if a way is obstructed, could a judgment on a suit for yesterday's obstruction bar a suit from being brought for to-day's obstruction.⁵ Nor, if a series of drams are sold at a bar, can an action for a sale yesterday prevent an action from being brought for a sale to-day.⁶ We may therefore hold, that although, when the question at issue goes to the gen-

¹ R. v. Benfield, 2 Burr. 984; R. v. Giddings, C. & M. 634; Com. v. McLanglin, 12 Cush. 615; Com. v. O'Brien, 107 Mass. 208; Kenney v. State, 5 R. I. 385; Fowler v. State, 3 Heisk. 154. For other cases see Whart. Cr. Pl. & Pr. § 469.

In Ben v. State, 22 Ala. 9, it was held not to be duplicity to include in one count the administering poison to three persons. See *contra*, People v. Warren, 1 Parker C. R. 338.

² People v. Warren, 1 Parker C. R. 338; Vaughan v. Com. 2 Va. Cas. 273; Smith v. Com. 7 Grat. 593; State

v. McClintock, 8 Iowa, 203; State v. Standifer, 5 Porter, 523. See on this topic Whart. Cr. Pl. & Pr. § 469.

³ See Whart. Cr. Pl. & Pr. § 475; People v. Townsend, 3 Hill (N. Y.), 479; R. v. Fairie, 8 E. & B. 486; 8 Cox C. C. 66. For analogous civil cases see Whart. on Ev. §§ 788-9.

⁴ Richardson v. Boston, 19 How. 263.

⁵ Evelyn v. Haynes, cited Taylor on Ev. § 1509; Connery v. Brooke, 73 Penn. St. 80.

⁶ State v. Coombs, 32 Me. 529. *Supra*, § 581.

eral liability of the defendant, a judgment may be admitted as *prima facie* determining such liability, yet a judgment on a suit for a breach of yesterday cannot be conclusive as to a suit for a breach of to-day. The same distinction may be illustrated by the rulings in civil cases as to recurring claims: *e. g.* taxes, and debts due by instalments.¹ But where the question whether a certain thing is a nuisance or a trespass is solemnly determined between the parties by a judgment for the plaintiff, or the prosecution, as the case may be, then the defendant is estopped from denying, on a suit for a continuing offence, the fact that the thing complained of is a nuisance or a trespass.²

§ 592. In civil practice, a former judgment, when offered by either party in bar, can be put in evidence under the general issue.³ In criminal practice, a special plea of *autrefois acquit* or *convict* is usually regarded as an essential prerequisite to the introduction of the record of the prior procedure.⁴ In some States, by statutes, the record can be put in evidence under the general issue.⁵

Prior
procedure
must be
specially
pleaded.

§ 593. Even when the parties are the same, and the judgment *prima facie* admissible, it is always open to a party against whom such judgment is offered, to show, by parol or otherwise, that notwithstanding this apparent identity, there is a difference in the points submitted in the two cases, either as to the offence or the offender. The issue thus raised as to identity is one of fact, which the jury must determine.⁶ So the substantial as well as formal identity may be

Parol evi-
dence ad-
missible to
identify or
to distin-
guish.

¹ Bigelow on Estoppel, 2d ed. 34; Duncan v. Bancroft, 110 Mass. 267.

² Whart. Crim. Law, 8th ed. § 475; Fowle v. R. R. 107 Mass. 352; Plate v. R. R. 37 N. Y. 472.

³ Whart. on Ev. § 765.

⁴ 2 Hale P. C. 241; Hawk. b. 2, c. 35; R. v. Crofts, 9 C. & P. 219; State v. Barnes, 32 Me. 530; Com. v. Merrill, 8 Allen, 545; Com. v. Chesley, 107 Mass. 223; Solliday v. Com. 28 Penn. St. 13; Nonemaker v. State, 34 Ala. 211; Foster v. State, 39 Ala. 329; Mountain v. State, 40 Ala. 344; Rocco v. State, 37 Miss. 357; Clem v.

State, 42 Ind. 420; State v. Salge, 2 Nev. 321. For a full discussion of pleading in this respect see Whart. Cr. Pl. & Pr. §§ 477 *et seq.*

⁵ Clem v. State, 42 Ind. 420.

⁶ R. v. Crofts, 9 C. & P. 219; R. v. Parry, 7 C. & P. 886; Ricardo v. Garcias, 12 Cl. & F. 368; R. v. Bird, 2 Den. C. C. 94; 5 Cox C. C. 20; Aspden v. Nixon, 4 How. 467; Goodrich v. City, 5 Wall. 566; Packet Co. v. Sickles, 5 Wall. 580; Post v. Smilie, 48 Vt. 185; Piper v. Richardson, 9 Met. 155; Com. v. Dillane, 11 Gray, 67; Leonard v. Whitney, 109 Mass.

shown by parol.¹ The burden of disputing a *prima facie* case of identity is on the party disputing.² But a point not at issue by the record cannot be shown by parol to have been decided by the case.³

II. WHEN JUDGMENT MAY BE IMPEACHED.

§ 594. A procedure before a court which, on the face of the record, has either no jurisdiction, or a jurisdiction which does not attach, is *coram non judice*, and may be impeached, even by the party in favor of whom the proceeding is instituted; ⁴ *a fortiori* by the party against whom it is offered.⁵ An inferior court must show on the record that it had jurisdiction.⁶ The same distinction holds good with respect to superior courts with limited statutory jurisdiction,⁷ and with regard to courts of any class obviously transcending their powers.⁸ If the record, however, avers the facts

Judgment
may be
collaterally
impeached
for want of
jurisdiction.

265; Com. v. Sutherland, 109 Mass. 342; Smith v. Sherwood, 4 Conn. 276; People v. McGowan, 17 Wend. 386; Porter v. State, 17 Ind. 415; Duncan v. Com. 6 Dana, 295; Newton v. White, 47 Ga. 400; Chamberlain v. Gaillard, 26 Ala. 504; Robinson v. Lane, 22 Miss. 161; State v. Andrews, 27 Mo. 267; State v. Small, 31 Mo. 197; State v. Thornton, 37 Mo. 360. Supra, §§ 509–11. For other cases see Whart. on Ev. § 785.

¹ Whart. on Ev. § 795.

² 2 Hale, 241; Com. v. Daley, 4 Gray, 209; State v. Small, 31 Mo. 197; State v. Thornton, 37 Mo. 360; Whart. Cr. Pl. & Pr. § 483.

³ Manny v. Harris, 2 Johns. 24; Jackson v. Wood, 3 Wend. 27.

⁴ Mercier v. Chace, 9 Allen, 242.

⁵ Supra, § 571; R. v. Chester, 1 W. Bl. 25; R. v. Washbrook, 4 B. & C. 732; R. v. Bowman, 6 C. & P. 337; Briscoe v. Stephens, 2 Bing. 213; 9 Moore, 413; Thompson v. Whitman, 18 Wall. 457; Hill v. Mendenhall, 21 Wall. 453; Penobscot R. R. v. Weeks, 52 Me. 456; State v. Hodgkin, 42 N. H. 475; Com. v. Alderman, 4 Mass. 477; Com. v. Goddard, 13 Mass. 457;

Borden v. Fitch, 15 Johns. 121; Latham v. Edgerton, 9 Cow. 227; Gage v. Hill, 43 Barb. 44; State v. Cooper, 1 Green (N. J.), 361; Fisher v. Longnecker, 8 Barr, 410; Com. v. Myers, 1 Va. Cas. 198; Wortham v. Com. 5 Rand. 699; James v. Smith, 2 S. C. 183; Parish v. Parish, 32 Ga. 653; Richardson v. Hunter, 23 La. An. 255; State v. Payne, 4 Mo. 376; Bonsall v. Isett, 14 Iowa, 309; Mayo v. Ah Loy, 32 Cal. 477; Dorsey v. Kendall, 8 Bush, 294; North v. Moore, 8 Kans. 143.

⁶ Harris v. Willis, 15 C. B. 709; Crawford v. Howard, 30 Me. 422; Clark v. Bryan, 16 Md. 171; Adams v. Tiernan, 5 Dana, 394; Gray v. McNeal, 12 Ga. 424.

⁷ Harris v. Hardeman, 14 How. 334; Morse v. Presby, 25 N. H. 299; Carleton v. Ins. Co. 35 N. H. 162; Huntington v. Charlotte, 15 Vt. 46; Embury v. Conner, 3 Comst. 322. See, however, Hahn v. Kelly, 34 Cal. 391; Tibbs v. Allen, 27 Ill. 119; and remarks in Bigelow on Estoppel, 2d ed. 124.

⁸ Windsor v. McVeigh, cited 93 U. S. 264.

necessary to constitute jurisdiction, such averments cannot (except in cases of fraud to be hereafter noticed) be collaterally disputed by parties or privies.¹ Nor, where the record shows jurisdiction (unless with the exception already noticed), can parties or privies collaterally dispute the rulings of courts on questions of jurisdiction which they did not dispute at the time.²

§ 595. Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite party may show the fraud and thus avoid the judgment. In criminal issues this is settled law. An acquittal or conviction a defendant manages to have fraudulently entered is no bar to a second prosecution.³ Fraud, however, must be substantively proved, or the prior judgment will be a bar.⁴ The burden is on the party setting up the fraud to show it.⁵

§ 596. A foreign judgment is impeachable for want of jurisdiction, and hence, for want of personal service, within the jurisdiction, on the defendant, this being internationally essential to jurisdiction. Thus, where a settlement was made in England on a marriage between a Turk domiciled in England and an English lady, the former promising to reside always in England, Hall, V. C., held

¹ McCormick v. Sullivan, 10 Wheat. 192; Morse v. Presby, 25 N. H. 299; Carleton v. Ins. Co. 35 N. H. 162; Coit v. Haven, 30 Conn. 190; Hartman v. Ogborn, 54 Penn. St. 120; Clark v. Bryan, 16 Md. 171; Simmons v. McKay, 5 Bush, 25; Callen v. Ellison, 13 Oh. St. 446; Moffitt v. Moffitt, 69 Ill. 641; Rice v. Brown, 77 Ill. 549; Hahn v. Kelly, 34 Cal. 391; 35 Cal. 533; McCauley v. Fulton, 44 Cal. 355; Smith v. Wood, 37 Tex. 616; though see Comstock v. Crawford, 3 Wall. 397, where it was held that the jurisdictional recitals of a statutory Probate Court were only *prima facie* evidence of the facts recited.

² Sheldon v. Wright, 5 N. Y. 497; Fitshugh v. McPherson, 9 Gill & J. 51.

³ Duchess of Kingston's case, 2

How. St. Tr. 544; R. v. Davis, 12 Mod. 9; R. v. Furzer, Say. 90; State v. Little, 1 N. H. 257; State v. Brown, 16 Conn. 54; Com. v. Alderman, 4 Mass. 477; Com. v. Jackson, 2 Va. Cas. 501; Bulson v. People, 31 Ill. 409; State v. Green, 16 Iowa, 239; Dunlap v. Cody, 31 Iowa, 260; Hulverson v. Hutchinson, 39 Iowa, 316; State v. Davis, 4 Blackf. 345; State v. Atkinson, 9 Humph. 677; State v. Colvin, 11 Humph. 599; Ellis v. Kelly, 8 Bush, 621; State v. Jones, 7 Ga. 422; State v. Cole, 48 Mo. 70. See State v. Lowry, 1 Swan, 34.

⁴ State v. Casey, Busbee, 209; State v. Tisdale, 2 Dev. & Bat. 159; Burdett v. State, 9 Tex. 43.

⁵ Ibid. Supra, §§ 226, 590 *a*; infra, § 596 *a*. See Welsh v. Mandeville, 1 Wheat. 33.

that a Turkish court could not, by a decree of divorce pronounced without notice to the wife or other persons interested under the settlement, make void the settlement. So it has been held that a foreign judgment can be contested, even by parties and privies, for fraud in its concoction; or for its flagrant violation of justice; or for non-identity of subject matter; or for incurable defectiveness or obscurity; or for manifest errors in its processes; or, generally, for any violation of the principles of international law.¹

§ 596 *a*. A conviction of crime, when offered to disqualify a witness, cannot be impeached by him, by proof of his innocence, since the law is that it is the conviction that disqualifies. The same rule obtains as to convictions when admitted under statutes which permit *convictions* of infamous crimes to be introduced in order to discredit a witness.² It is otherwise, however, when there is no such statute. Even supposing that it is admissible at common law to put in evidence, to discredit a witness, his conviction of a specific crime, not involving perjury, the record, when admitted, is, so far as concerns the parties to the suit, *res inter alios acta*, and hence it is open to impeachment by proof of the witness's innocence.³ And a judgment, so far as it affects persons not parties to the record, and who could not have become parties, is *res inter alios acta*, and, if admissible at all, is open to impeachment.⁴

III. ADMINISTRATION AND PROBATE.

§ 597. Letters of administration are not, so far as concerns third parties, adequate proof of the fact of death of the alleged decedent; and when offered, even as between parties or privies, they may be rebutted and invalidated by proof that the party whom they declared to be dead was really alive.⁵

§ 598. A probate of a will is the judicial action of a court having jurisdiction, admitting a will as *prima facie* genuine

¹ Whart. on Evid. § 803.

Hard. 311; Mead v. Boston, 3 Cush.

² Com. v. Gallagher, 126 Mass. 54.

404. Supra, §§ 439, 489.

³ Sims v. Sims, 75 N. Y. 472, citing Maybee v. Avery, 18 Johns. 352; People v. Buckland, 13 Wend. 592. See Gibson v. McCarthy, Cas. temp.

⁴ Whart. on Ev. § 803.

⁵ Whart. on Ev. § 810, and cases there cited. See article in Am. Law Rev. for May, 1880.

and valid. Technically it is a copy of the will, sealed with the seal of the Court of Probate, and attached to a certificate that the will has been proved, and that administration of the goods of the deceased has been granted to one or more of the executors named, or, in default of executors, to administrators. A probate of a will is only *prima facie* proof of the validity of the will as against parties seeking to avoid it on ground of insanity,¹ or on the ground of other incompetency,² or of imperfect execution.³ And a person indicted for forging a will cannot set up the probate of the will as even *prima facie* a defence.⁴ With regard to recitals (*e. g.* that of the presence of a party in court), a decree of a Court of Probate has been held to be *prima facie* evidence as to strangers,⁵ though this can only be good to prove the record action of the court. Such recitals cannot be received to estop parties not served, but who should have been served.⁶

Probate of a will not conclusive as to strangers, but otherwise as to parties.

§ 599. Inquisitions of lunacy are necessarily *ex parte*, so far as concerns the person claimed to be a lunatic; since, on the assumption by which alone they have validity, he is a lunatic, and if a lunatic, he is not capable of putting in a valid appearance. Unless upon the hypothesis that such proceedings are *in rem*,⁷ they cannot be held admissible against strangers; and at the best present only a *prima facie* case.⁸

Inquisition of lunacy *prima facie* proof.

IV. JUDGMENTS IN REM.

§ 600. It is maintained by Mr. Taylor, that whether a judgment *in rem* is conclusive in a criminal proceeding is a question which admits of some doubt. "In the Duchess of Kingston's case, the judges expressed a decided opinion in the negative: urging, first, that it would be contrary to public policy that the temporal courts, in the investigation of a criminal charge, should be bound by a decision, perhaps, of an ecclesiastical judge, addressed only to the conscience of the party, and founded, as it might be, on evidence inadmissible at common law; and next, that if such a decision

Effect of judgments *in rem* in criminal cases.

¹ Marriot v. Marriot, 1 Str. 671.

⁶ Supra, § 594; Randolph v. Bayue,

² Dickinson v. Hayes, 31 Conn. 417. 44 Cal. 366.

³ Charles v. Huber, 78 Penn. St. 449.

⁷ See Whart. on Ev. § 817.

⁴ R v. Buttery, R. & R. 342.

⁸ Whart. on Ev. § 599.

⁵ Sawyer v. Boyle, 21 Tex. 28. See Lovell v. Arnold, 2 Munf. 167.

were conclusive in favor of a prisoner, it would be equally binding against him, and, consequently, his life, liberty, property, and fame might depend upon the judgment of a court which had no organs to discover whether he had committed a crime or not.¹ On the other hand, it has been contended that this opinion of the judges, when taken apart from the reasons on which it is founded, is not entitled to much weight, being merely an *obiter dictum* unnecessary for the decision of the points submitted to them;² and then, in answer to the reasons, it is said that nothing can be more inconvenient or dangerous than a conflict of decisions between different courts; and that, if judgments *in rem* are not regarded as binding upon all courts alike, the most startling anomalies may occur.”³ And there are some intimations that judgments *in rem* bind in criminal as well as in civil suits.⁴

V. JUDGMENTS VIEWED EVIDENTIALLY.

§ 601. There is no reason why former proceedings in criminal, as well as in civil suits, should not be admissible to prove relevant facts.⁵ Whenever, in fact, a former judicial procedure is material, then the record must be produced. Of this we have a familiar illustration in cases in which an offence is punished more severely on account of a former conviction, and in which, to justify such increased penalty, it is necessary for the indictment to aver and the evidence to establish such former conviction. For this purpose the record of the former trial must be introduced; though, as is elsewhere seen,⁶ statutes have been enacted in some juris-

Averments
of record
of former
prosecu-
tions ad-
missible.
Prior con-
victions.

¹ Ibid.; 20 How. St. Tr. 540-543;

² Smith L. C. 642 S. C.

³ 2 Smith L. C. 676, 677.

⁴ Taylor's Ev. § 1493.

He adds: The authorities reported in the books throw little light upon the subject. *R. v. Buttery* is sometimes cited as confirming the opinion of the judges in the *Duchess of Kingston's* case, but in fact it lends little, if any, support to that opinion; for the only point there determined was, that, if a party be indicted for forging a will, the mere production of the

probate is not conclusive evidence of its validity; a doctrine which is unquestionably sound law, but which, as before stated, would apply equally to a civil action, provided the object was not to dispute the title of the executor.

⁴ See *R. v. Hickling*, 7 Q. B. 880; *R. v. Grundon*, 1 Cowp. 315.

⁵ See cases cited *supra*, §§ 570-573; *Janes v. Buzzard*, 1 Hempst. 240; *Parsons v. Copeland*, 30 Me. 370; *Canon v. Abbot*, 1 Root, 251.

⁶ Whart. Cr. Pl. & Pr. § 938, where the cases are collected.

dictions by which the prior conviction is not to be submitted to the jury until they have found the defendant guilty of the charge primarily on trial. When such a statute is not in operation, however, it is necessary to lay the record of the prior conviction before the jury; though they should at the time be instructed not to permit the fact of such former conviction in any way to influence them in determining the question of the defendant's guilt of the immediate charge.¹

§ 602. As at common law the conviction of the principal is a condition precedent to the conviction of the accessory, it is necessary, on the trial of the accessory, to put in evidence the record of the conviction of the principal. This record is, however, only *prima facie* proof of the guilt of the principal; and may be impeached by proof that such conviction was erroneous.² Judgment must have been entered on the verdict to make the record admissible.³ The burden of proving that the principal was not guilty is on the accessory,⁴ nor is the accessory restricted to proof of facts shown on the former trial.⁵ On the other hand, it is admissible for the prosecution to put in evidence facts tending to show the principal's guilt.⁶

§ 602 *a*. A prior judgment may be also admissible as part of the evidence on which the case for or against the defendant may be made out.⁷ This is eminently the case in proceedings for perjury, in which the record of the trial at which the alleged perjury was committed is admissible as inducement, though not to prove the perjury.⁸ And on an indictment for escape, it is necessary, if the person escaped was a convict, to put in evidence his conviction, though this does not

Conviction
of principal
evidence
against
accessory.

Judgment
to estab-
lish other
facts.

¹ Ibid. See *R. v. Shuttleworth*, 3 C. & K. 375. That any number of prior convictions may be so alleged and proved see *R. v. Clark*, 3 C. & K. 367; 6 Cox C. C. 210.

² *R. v. Turner*, Mood. C. C. 347; *R. v. Ratcliff*, 1 Lew. 121; *U. S. v. Hartwell*, 3 Cliff. 221; *State v. Ricker*, 29 Me. 84; *State v. Rand*, 33 N. H. 216; *Com. v. Knapp*, 10 Pick. 477; *People v. Buckland*, 13 Wend. 592; *Keithler v. State*, 10 Sm. & M. 192.

³ *State v. Duncan*, 6 Ired. 236.

⁴ *Com. v. Knapp*, 10 Pick. 484; *State v. Chittam*, 2 Dev. 49; *State v. Duncan*, 6 Ired. 236.

⁵ Ibid.; *State v. Sims*, 2 Bail. S. C. 29.

⁶ *Levy v. People*, Ct. App. N. Y. 1880, 21 Alb. L. J. 313.

⁷ *Com. v. McPike*, 3 Cush. 181.

⁸ *R. v. Christian*, C. & M. 388; *R. v. Browne*, 3 C. & P. 572; *R. v. Iles*, B. N. P. 243; *R. v. Stoveld*, 6 C. & P. 489; *Brown v. State*, 47 Ala. 47.

prove guilt.¹ It has also been held that on the trial of an indictment for manslaughter, the record of a conviction of the defendant for the assault which caused death (the deceased having died after such conviction) is conclusive evidence that the assault was unjustifiable.²

It may be relevant, also, to prove a former offence committed by the defendant as part of a system of crime of which the offence under trial is another part. If so, it is admissible to put in evidence the defendant's conviction of the former offence.³ Where, also, the offence charged is that of being a common thief, a prior conviction of larceny is admissible as part of the case of the prosecution.⁴

§ 603. If the object of the evidence be to prove a particular judicial result, *e. g.* the entering of a judgment, it is not enough to have a certificate of the result. The whole record, so far as it concerns the formal stages,

¹ *R. v. Shaw*, R. & R. 526; *R. v. Waters*, 12 Cox C. C. 390; *Davies v. Lowndes*, 1 Bing. N. C. 607; *Com. v. Miller*, 2 Ashmead, 61; *Kyle v. State*, 10 Ala. 226.

² *Com. v. Evans*, 101 Mass. 25.

In this case Wells, J., said: "The former conviction for assault and battery is not pleaded as a bar to this indictment. As the death occurred after the conviction, the offence now prosecuted was not then complete; and was not capable of judicial determination. The two offences are not identical in law. *Com. v. Roby*, 12 Pick. 496; *Com. v. Cutler*, 9 Allen, 486. See also *R. v. Salvi*, 10 Cox C. C. 481, n.; and see *infra*, § 585. The identity, in fact, of the assault which caused the death with that which was the subject of the former conviction, is conceded. The record was therefore competent to prove the fact of such conviction. *Com. v. McPike*, 8 Cush. 181. The only question is, as to the effect of that judgment, as evidence, upon the issues of fact raised in the trial of this case for manslaughter.

The court below ruled that it established conclusively that the assault was unjustifiable, and therefore disproved the position of the defendant in this case, that the knife was used in self-defence. Upon general principles, the parties being the same, the former judgment must be held to have established all the facts which were involved in the issue then tried, and essential to the judgment rendered upon it. The conviction for assault and battery therefore necessarily excludes all justification which could have been set up under the general issue of not guilty. The facts of the assault remain the same; and whatever would sustain the ground of self-defence, now relied upon, would have been a complete defence to the former prosecution. The verdict and judgment in that case were therefore rightly held to be a conclusive answer to the attempt at justification made in this case." *Com. v. Austin*, 97 Mass. 595.

³ *State v. Neagle*, 65 Me. 468.

⁴ *World v. State*, 50 Md. 47.

must be either produced or exemplified, and if exemplified the exemplification must show on its face that the record is complete.¹ The component parts of the record should be so attached that it will appear that the certificate extends to them all.² A certificate that a transcript is true and perfect, enumerating all

¹ See *supra*, §§ 179, 184, 195; *R. v. Smith*, 8 B. & C. 341; *Godofrey v. Jay*, 3 C. & P. 192; *R. v. Robinson*, 1 C. & D. 329; *Porter v. Cooper*, 6 C. & P. 354; *R. v. Birch*, 3 Q. B. 431; *Jay v. East Livermore*, 56 Me. 107; *Merrill v. Foster*, 33 N. H. 379; *Hawks v. Truesdell*, 99 Mass. 557; *Davidson v. Murphy*, 13 Conn. 213; *Belden v. Meeker*, 2 Lansing, 470; *Com. v. Trout*, 76 Penn. St. 379; *Numbers v. Shelly*, 78 Penn. St. 426; *Carrick v. Armstrong*, 2 Cold. 265; *Evans v. Reed*, 2 Mich. N. P. 212; *Sternburg v. Callanan*, 14 Iowa, 251; *Smith v. Smith*, 22 Iowa, 516; *Miles v. Wingate*, 6 Ind. 458; *Miller v. Deaver*, 30 Ind. 371; *Young v. Thompson*, 14 Ill. 380; *Oliver v. Persons*, 30 Ga. 391; *Mitchell v. Mitchell*, 40 Ga. 11; *Hallet v. Eslava*, 3 St. & P. 105; *Anderson v. Cox*, 6 La. An. 9; *Loper v. State*, 4 Miss. 429; *Wash v. Foster*, 3 Mo. 205; *Mason v. Wolff*, 40 Cal. 246; *Ogden v. Walters*, 12 Kans. 282.

The English practice is thus stated by Mr. Roscoe (*Criminal Ev.* 8th ed. 824): —

“A record is not complete until delivered into court in parchment. Thus the minutes made by the clerk of the peace at sessions, in his minute book, are neither a record nor in the nature of a record so as to be admissible in evidence as proof of the names of the justices in attendance. *R. v. Bellamy*, Ry. & Moo. 172. And where, to prove an indictment for felony found by the grand jury, the indictment itself (which was in another court), indorsed ‘a true bill,’ was pro-

duced by the clerk of the peace, together with the minute book of the proceedings of the sessions at which the indictment was found, the Court of King’s Bench held, that in order to prove the indictment it was necessary to have the record regularly drawn up, and that it should be proved by an examined copy. *R. v. Smith*, 8 B. & C. 341; *Cooke v. Maxwell*, 2 Stark. 183. So an allegation that the grand jury at sessions found a true bill is not proved by the production of the bill itself with an indorsement upon it, but a record, regularly made up, must be produced. *Porter v. Cooper*, 6 C., & P. 354; 4 Tyr. 456; 1 C., M. & R. 388, S. C. So it has been ruled on an indictment for perjury, that in order to prove that an appeal came on to be heard at sessions, it must be shown that a record was regularly made upon parchment. *R. v. Ward*, 6 C. & P. 366; and see *R. v. The Inhabitants of Pembrige*, Carr. & M. 157.”

In *R. v. Gordon*, C. & Marsh. 410, Lord Denman held that an allegation in an indictment for perjury, that judgment was “entered up” in an action, was proved by producing from the judgment office the book in which the inscription was entered. On the other hand, in *R. v. Thring*, 5 C. & P. 507; and *R. v. Robinson*, 1 Crawf. & D. C. C. 329, it was held that, on an indictment for perjury in a prosecution, the record of the former trial must be made up.

² *Susquehanna R. R. v. Quick*, 68 Penn. St. 189; *Herndon v. Givens*, 16 Ala. 261.

the usual parts of a record, is sufficient.¹ But a complete extension of the record will not be exacted when all that is substantial appears,² though if the judgment of a court is put in evidence to effect a transfer of rights, the preliminary conditions of the judgment must, in some shape, appear on the record. Even a sentence in admiralty, to sustain its admissibility for such purpose, must have attached to it the preliminary proceedings on which it is based;³ and a judgment of an ecclesiastical or probate court cannot prove title without producing the libel and answer, and the defensive allegations.⁴

§ 604. The journals of a court, in those jurisdictions where such journals are kept, though not technically part of the record, are to be regarded as proof, when duly verified, of the action of the court in any matter to which they relate. They are therefore admissible, in any view, provisionally.⁵ In such case, the object being to show that some other proceeding has occurred before the same court, a minute of the former proceeding will be admitted in lieu of the record, whenever the formal record cannot be presumed to have been made up.⁶ The minutes of a court, however, cannot be introduced to contradict a record.⁷

¹ *Coffee v. Neely*, 2 Heisk. 304.
² See *supra*, § 179; *R. v. Newman*, 2 Den. C. C. 390. "It is not now denied that the record of the Court of Common Pleas for Luzerne County, in the State of Pennsylvania, offered in evidence by the plaintiff, was duly authenticated according to the statutes of the United States and of this Commonwealth. U. S. Sts. 1790, c. 11; 1804, c. 56; Gen. Sts. c. 131, § 61. It is not extended with the formality and accuracy required in the records of our own courts, but it is sufficient in substance, and contains all the essential requisites of a judicial record. It shows the parties to the suit, the subject matter of the suit, jurisdiction over the parties, a final judgment of

the court for fixed sums in damages and costs, and the date of the judgment. *Knapp v. Abell*, 10 Allen, 485. It was, therefore, rightly admitted in evidence." *Brainard v. Fowler*, 119 Mass. 262, Morton, J. In Kansas it has been ruled that a certificate of the entry of a foreign judgment may be received as *prima facie* proof of the judgment, without requiring the whole record to be certified. *Haynes v. Cowen*, 15 Kans. 637.

³ Com. Dig. Ev. C. 1; Taylor's Ev. § 1411.

⁴ *Leake v. M. of Westmeath*, 2 M. & Rob. 394, per Tindal, C. J., overruling *Stedman v. Gooch*, 1 Esp. 6.

⁵ *R. v. Browne*, 3 C. & P. 572.

⁶ *R. v. Tooke*, 25 How. St. Tr. 446-

⁷ *Den v. Downam*, 13 N. J. L. 135; *Mandeville v. Stockett*, 28 Miss. 398. See *Strong v. Bradley*, 13 Vt. 9.

§ 605. What has been said of the minutes of the court applies *a fortiori* to the docket entries, regularly entered by the clerk or prothonotary,¹ which give the details from which the record is made up, and which can be received in place of the record until it is made up.² In many jurisdictions, the docket, which contains the substantial parts of the record, is regarded as its substitute until such time as a full record is required for removal to a superior court.³ Even after a record is extended, if it be lost, the docket entries become primary.⁴

Docket entries not admissible when full record can be had.

The docket entries, when lost, can be proved by parol.⁵

§ 606. An ancient record, taken from the proper depository, may be proved in fragments, when no fuller proof is attainable.⁶ It is otherwise, however, when the fragments offered have no internal evidence of authority.⁷

Rule relaxed as to ancient records.

§ 607. It frequently happens, as is elsewhere incidentally noticed,⁸ that record proof is appealed to merely to establish

449; recognized in *R. v. Smith*, 8 B. & C. 343; *R. v. Robinson*, 1 Craw. & Dix, 329; *R. v. Reilly*, Ir. Cir. R. 795, per Doherty, C. J.

So far, however, as concerns the testimony of a former witness, a judge's notes are not original evidence, but can only be used to refresh his memory. *Supra*, § 281; and see *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64. As to justice's minutes, see *Grosvenor v. Tarbox*, 39 Me. 129. As to trial lists see *Wilkins v. Anderson*, 11 Penn. St. 399.

¹ *Com. v. Bolkom*, 3 Pick. 281; *Townsend v. Way*, 5 Allen, 426; *Keller v. Killion*, 9 Iowa, 329; *Prentiss v. Holbrook*, 2 Mich. 372; *Hair v. Melvin*, 2 Jones, 59; *Handley v. Russell*, Hard. (Ky.) 145.

² *Whart. on Ev.* § 826; *State v. Neagle*, 65 Me. 468; *Com. v. Weymouth*, 2 Allen, 144; *Boyd v. State*, 36 Penn. St. 355; *Boteler v. State*, 8 Gill & J. 359; *Weighorst v. State*, 7 Md. 446; *Maguire v. State*, 47 Md. 497.

³ *Jay v. Livermore*, 56 Me. 117; *Willard v. Harvey*, 24 N. H. 314; *Hamilton v. Com.* 16 Penn. St. 129.

It has been held in Maine (*State v. Hines*, 68 Me. 202), that where the record has not been extended, docket entries showing that, in a former trial of the defendant for a violation of the same provision of the statute, a verdict of guilty has been rendered, exceptions filed, and subsequently overruled and certified by the law court to the clerk of the county, and no other proceedings pending for the reversal of the verdict, are sufficient proof of a prior conviction, though no sentence has been passed.

⁴ *Whart. on Ev.* § 605.

⁵ *Pruden v. Alden*, 23 Pick. 187; *Tillotson v. Warner*, 3 Gray, 574. See *Whart. on Ev.* § 135.

⁶ See *Whart. on Ev.* § 136.

⁷ *Taylor's Ev.* § 1423, citing *Evans v. Taylor*, 7 A. & E. 617; 3 N. & P. 174; *Vaux Barony*, Min. Ev. 67; *Leighton v. Leighton*, 1 Str. 308.

⁸ *Supra*, §§ 570, 602.

evidentially (as distinguished from dispositively, or from estoppel) some circumstance relevant to the case.¹ Thus the object of the evidence may be merely to prove the fact of a former trial, and in such case, on an indictment for perjury committed at such trial, it has been held that the production by the officer of the court of the caption, the indictment with the indorsement of the prisoner's plea, the verdict and the sentence of the court upon it, is sufficient, without the production of the record.² Or again, the object is to prove that A. B. was resident at C. at the particular time. As an item of proof in such a case, it is admissible to put in evidence a justice's writ, of the date in question, in favor of A. B. of C.³ If the object be to prove an arrest or attachment, the officer's return to this effect establishes a *prima facie* case. And, generally, when the object is to introduce certain record facts as part of the indicatory evidence of a case (*e. g.* to show that a certain writ issued, or was returned in a particular way), then the pertinent portions of a record may be certified and put in evidence separately.⁴

§ 608. In order, however, to admit separate portions of record to prove certain facts, they must be shown to be complete in their relation to such facts.⁵ Thus, if the object be to show that a search-warrant legally issued, it must appear that it was preceded by the proper oath;⁶ if the object is to prove service of process, an officer's return must be set forth.⁷ It is also stated that writs and warrants, before their return, must be proved by actual production, though after

¹ See *Blower v. Hollis*, 1 C. & M. 396; *Leake v. Westmeath*, 2 M. & Rob. 397; *Attwood v. Taylor*, 1 M. & Gr. 289; *Benedict v. Heineberg*, 43 Vt. 231; *Lee v. Stiles*, 21 Conn. 500; *Whitmore v. Johnson*, 10 Humph. 610; *Smith v. Pattison*, 45 Miss. 619; *Watts v. Clegg*, 48 Ala. 561.

² *R. v. Newman*, 2 Den. C. C. R. 390; S. C., 21 L. J. M. C. 75.

³ *Cavendish v. Troy*, 41 Vt. 99. See *supra*, § 570.

⁴ *Whart. on Ev.* § 828; *World v.*

State, 50 Md. 49; and cases cited *supra*, § 602 a.

⁵ *Buford v. Hickman*, 1 Hempst. 232; *Glenn v. Garrison*, 17 N. J. L. 1; *Kendrick v. Kendrick*, 4 J. J. Marsh. 241; *Welch v. Walker*, 4 Porter, 120; *Vassault v. Austin*, 32 Cal. 597.

⁶ *Halsted v. Brice*, 13 Mo. 171.

⁷ *Peers v. Carter*, 4 Litt. (Ky.) 268; *Lyne v. Bank*, 5 J. J. Marsh. 545.

their return, when they become matters of record, they are provable by copies.¹

§ 609. When the object of proving a verdict is the refreshing the memory of a witness, or forming one of the links of the chain of circumstantial evidence in a matter collateral to the merits of the verdict, the verdict may be put in evidence as a mere evidentiary fact, not as in any way showing that it was true, but simply as proving that it was taken.² For the purpose of proving reputation, a verdict, without judgment, has been held admissible, even against strangers, when the verdict goes directly to reputation. But this holds good only as to ancient verdicts, and such as have been acquiesced in by the parties; and, as a general rule, a verdict cannot be put in evidence unless judgment has been entered on it.³ In criminal cases, however, as we have seen, a verdict of acquittal operates as a bar without a judgment; and so, under certain conditions, does a verdict of conviction.⁴

Verdict inadmissible without record.

§ 610. As has been already incidentally observed,⁵ when a record is ancient, and when its imperfect condition is to be ascribed to the usual deteriorating effects of time, it is admissible to prove such portions of it as are attainable, imperfect as they may be. It is essential, however, that such documents should have been produced from the proper office, and should on their face exhibit *prima facie* evidence of regularity. When lost, such records may be supplied by parol.⁶

Parts of ancient records may be received.

¹ Taylor's Ev. § 1424, citing B. N. P. 284.

The mere fact of a paper being found among a bundle of papers in a clerk's office does not make it an office paper, and so admissible. *Bank v. Donaldson*, 6 Penn. St. 179.

² *R. v. Tooke*, 25 How. St. Tr. 446; *R. v. Smith*, 8 B. & C. 343; Whart. on Ev. §§ 824 (note 7), 825.

³ See Whart. on Ev. § 831.

Where an indictment for perjury against A. alleged that B. was convicted on an indictment for perjury,

upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record, when produced, that B. had been convicted, but the judgment against him had been reversed upon error, after the finding of the present indictment; it was held that the record produced supported the indictment. *R. v. Meek*, 9 C. & P. 513.

⁴ Supra, § 574.

⁵ Supra, § 606.

⁶ Whart. on Ev. § 833. Supra, §§ 204, 606.

§ 611. An officer's return in execution of a writ may be admissible for the following purposes : —

Return of
officer may
be evi-
dence.

1. *As a link in title, or in any other way as a basis of suit.*¹

2. *As binding the officer making it.* In such case the return is a solemn admission, conclusive against the officer and his privies. He may, however, put in evidence supplementary facts,² not inconsistent with his return.³ When offered in the officer's favor, however, the return is but *prima facie* proof of its contents.⁴

3. *As binding the parties.* A party issuing a writ is also bound by it, and is ordinarily estopped from disputing its averments.⁵ So far as concerns such parties, the verity of the returns of the officers cannot, as we have seen, be disputed collaterally. The redress must be by application to the court from which the execution issues.⁶ When, however, a return is ambiguous, it may be explained by parol.⁷

4. *As proving its legal effects.* A return may be put in evidence against strangers to prove that it issued ; or to prove, in the same manner as may a judgment, its legal effects.⁸ But when used to affect the interest of strangers, such returns, so far as concerns facts which it is the duty of the officer to state, are only *prima facie* evidence at the best, and as to other facts are not evidence at all.⁹

§ 612. A *fi. fa.* returned *nulla bona*, or returned in such a way as to indicate insolvency in the execution defendant, may be admissible as *prima facie* proof in a link in the evidence to prove such insolvency. To the execution, however, it has been held proper that the record should be attached ; and even if this be dispensed with, the execution must have the seal of the court. Proceedings in insolvency are in like manner admissible to prove, in collateral proceedings, the debtor's insolvency.¹⁰

Return of
nulla bona
admissible
to prove
insol-
vency.

¹ Whart. on Ev. § 833. *Infra*, § 642.

² *Ibid.*

³ Whart. on Ev. § 834.

⁴ Freeman on Executions, § 366.

⁵ *Ibid.*; Whart. on Ev. § 834.

⁶ Whart. on Ev. § 834. See Freeman on Executions, § 364.

⁷ Whart. on Ev. § 834; Herman on Executions, §§ 240, 244, 295.

⁸ See Whart. on Ev. §§ 822-4, 834.

⁹ Whart. on Ev. § 833. *Infra*, § 642.

¹⁰ Whart. on Ev. § 834.

VI. RECORDS AS ADMISSIONS.

§ 613. A judgment may be also treated as evidentiary when it involves a self-disserving admission of the party against whom it is offered.¹ Record may be an admission.

§ 614. When an officer, or his sureties, is sued on his return, then such return is conclusive against him so far as it involves admission of the reception of goods by himself; and the same rule holds on criminal proceedings against him on his return.² A party, also, who has obtained possession of property by decree of court solemnly prayed for by himself, cannot afterwards, in a suit against him to recover claims on such property, deny the ownership. And a party may preclude, himself from offering evidence inconsistent with the attitude assumed by him in a particular suit, as where, on demurrer, he is precluded from disputing facts the demurrer admits,³ or where, after one plea is entered, a repugnant plea will not be received.⁴ But this does not prevent the entering of successive pleas tentatively.⁵ Parties bind themselves by their admission of record.

§ 615. The pleadings of a party in one suit may be used in evidence against him in another, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But in order to bring such admission home to him, the pleading must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts.⁶ Yet even if such admissions are thus brought home to the party, they are entitled to little weight.⁷ A plea of guilty, in a criminal issue, however, being presumed to be solemnly entered by the defendant himself, may be put in evidence against him as a confession of the fact, in a civil issue.⁸ And a plea verified by affidavit, or an answer in Pleadings may be admissions.

¹ Whart. on Ev. § 836. *Infra*, §§ 638 *et seq.*

² Whart. on Ev. § 837. *Supra*, § 611; *infra*, §§ 638-9.

³ See Whart. Cr. Pl. & Pr. § 400.

⁴ *Ibid.* § 419.

⁵ *Ibid.* § 420; Whart. on Ev. § 837.

⁶ *Infra*, § 697.

⁷ *Infra*, §§ 638-42. See for cases Whart. on Ev. § 838.

⁸ *Supra*, § 577; Anon. cited Phil. Ev. 25; *R. v. Fontaine Moreau*, 11 Q. B. 1033; *Bradley v. Bradley*, 2 Fairf. 367; *Green v. Bedell*, 48 N. H. 546; *Clark v. Irvin*, 9 Ham. 131. See Whart. on Ev. § 776.

chancery, may be properly viewed as a solemn admission;¹ though the party must have been capable of binding himself by the plea; and hence a person cannot be made responsible criminally for a plea made by him when incompetent by reason of infancy.² A plea in abatement, filed by a party in a particular suit, on which there is judgment in his favor, estops him from afterwards denying the facts set up in the plea.³ But dilatory pleas, and pleas on which no judgment in favor of the party pleading is entered, are always rebuttable.⁴

§ 616. A “demurrer only admits the facts which are well pleaded; it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument.”⁵ And so the “mere averments of a legal conclusion are not admitted by a demurrer, unless the facts and circumstances set forth are sufficient to sustain the allegation.”⁶ In criminal cases a demurrer to the prosecution’s evidence admits all the facts that the evidence tends to prove.⁷

§ 617. Facts pertaining to a record, but not entered on the record, may be certified to by the proper clerk, and the certificate received as evidence.⁸ Thus the certificate of a clerk of a Circuit Court has been received to prove that a cause was not tried at the circuit;⁹ and the certificate of a court of appeals may be evidence to prove reversal of a judgment.¹⁰

¹ *Infra*, § 638–41.

² *R. v. Stone*, 1 F. & F. 311. *Infra*, § 638.

³ *Whart. Cr. Pl. & Pr.* § 425. *Supra*, § 94.

⁴ See *Whart. on Ev.* § 838; *Com. v. Lannan*, 13 Allen, 563. The evidential effect of plea of guilty is hereafter fully considered. *Infra*, §§ 638–41.

⁵ *Clifford, J., Gould v. R. R.* 91 U.

S. 536. Compare *Whart. Cr. Pl. & Pr.* §§ 400–3.

⁶ *Ibid.*

⁷ *Com. v. Parr*, 5 W. & S. 345; *Brister v. State*, 26 Ala. 108. See *Golden v. Knowles*, 120 Mass. 336; *Whart. Cr. Pl. & Pr.* § 407.

⁸ See *supra*, §§ 166, 195–201.

⁹ *Wright v. Murray*, 6 Johns. 286. See *supra*, § 166.

¹⁰ *Hoy v. Couch*, 6 Miss. 188.

CHAPTER XII.

MODIFICATION OF DOCUMENTS BY PAROL.

§ 620. It is rarely that an issue can arise, in criminal procedure, involving the modification of a document by parol. Documents It is enough, therefore, in the present volume, to state, not to be as a general rule, that to vary the terms of a document varied by parol. parol evidence cannot be received. It is important, at the same time, to keep in mind the distinction between documents which are uttered dispositively, *i. e.* for the purpose of disposing of rights ; and those uttered non-dispositively, *i. e.* not for the purpose of disposing of rights. A non-dispositive, or, to adopt Mr. Bentham's term, a "casual" document, is more open to parol variation than is a document which is dispositive, or, as Mr. Bentham calls it, "predetermined." A casual or non-dispositive document (*e. g.* a letter or memorandum thrown off hurriedly in the ease and carelessness of familiar intercourse, without intending to institute a contract, and without reference to the litigation into which it is afterwards pressed) is peculiarly dependent upon extraneous circumstances ; is often inexplicable unless such circumstances are put in evidence ; and employs language which, so far from being made up of phrases selected for their conventional business and legal limitations, is marked by the writer's idiosyncrasies, and sometimes comprises words peculiar to the writer himself. But whether such documents are informally or formally constituted, they agree in this, that, so far as concerns the parties to the case in which they are offered, they were not prepared for the purpose of disposing of the rights of the party from whom they emanate. *Dispositive* documents, on the other hand, are deliberately prepared, and are usually couched in words which are selected for the purpose, because they have a settled legal or business meaning. Such documents are meant to bind

the party uttering them in both his statements of fact and his engagements of future action ; and they are usually accepted by the other contracting party (or, in case of wills, by parties interested), not in any occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms. It stands to reason, therefore, that parol evidence is not as a rule to be received to vary the terms of documents so prepared and so accepted, though it is otherwise when such documents are offered, not dispositively, between the parties, but non-contractually, as to strangers. So far as concerns the parties or privies to a dispositive document, valid in itself, its terms cannot ordinarily be varied by parol.¹

¹ See Whart. on Ev. vol. ii. c. xii. where the topic before us is discussed as follows :—

I. General Rules.

Parol evidence not admissible to vary documents as between parties, § 920.

New ingredients cannot be thus added, § 921.

Dispositive documents may be varied by parol as to strangers, § 923.

Whole document must be taken together, § 924.

Written entries are of more weight than printed, § 925.

Informal memoranda are excepted from rule, § 926.

Parol evidence admissible to show that document was not executed, or was only conditional, § 927.

And so to show that it was conditioned on a non-performed contingency, § 928.

Want of due delivery, or of contingent delivery, may be proved by parol, § 930.

Fraud or duress in execution may be shown by parol, and so of insanity, § 931.

But complainant must have a strong case, § 932.

So as to concurrent mistake, § 933.

So of illegality, § 935.

Between parties intent cannot be proved to alter written meaning, § 936.

Otherwise as to ambiguous terms, § 937.

Declarations of intent need not have been contemporaneous, § 938.

Evidence admissible to bring out true meaning, § 939.

For this purpose extrinsic circumstances may be shown, § 940.

Acts admissible for the same purpose, § 941.

Ambiguous descriptions of property may be explained, § 942.

Erroneous particulars may be rejected as surplusage, § 945.

Ambiguity as to extrinsic objects may be so explained, § 946.

Parol evidence admissible to prove "dollar" means Confederate dollar, § 948.

Parol evidence admissible to identify parties, § 949.

To enable undisclosed princi-

§ 621. In criminal practice few cases arise in which the ordinary exceptions to this rule are appealed to. We may, however, generally say that parol evidence is admissible to identify a record, and to explain its subject matter;¹ and to show that a forged document, on its face invalid, is one on which a prosecution may *primâ facie* be sustained.²

But parol evidence admissible to identify and distinguish document.

pal to sue or be sued, he may be proved by parol, § 950.

But person signing as principal cannot set up that he was agent, § 951.

Suretyship on writing may be shown by parol, § 952.

Other cases of distinction and identification, § 953.

Evidence of writer's use of language admissible to solve ambiguities, § 954.

Party may be examined as to intent or understanding, § 955.

Patent ambiguities cannot be explained by parol, § 956.

"Patent" is "subjective," and "latent" "objective," § 957.

Usage cannot be proved to vary dispositive writings, § 958.

Otherwise in case of ambiguities, § 961.

Usage is to be brought home to the party to whom it is imputed, § 962.

May be proved by one witness, § 964.

Usage is to be proved to the jury, and must be reasonable and not conflicting with *lex fori*, § 965.

When no proof exists of usage, meaning is for court, § 966.

Power of agent may be construed by usage, § 967.

Usage received to explain broker's memoranda, § 968.

Customary incidents may be annexed to contract, § 969.

Course of business admissible in ambiguous cases, § 971.

Opinion of expert inadmissible as to construction of document; but otherwise to decipher and interpret, § 972.

Parol evidence admissible to rebut an equity, § 973.

Opinion of witnesses as to libel admissible, § 975.

Dates not necessarily part of contract, § 976.

Dates presumed to be true, but may be varied by parol, § 977.

Exception to this rule, § 978.

Time may be inferred from circumstances, § 979.

II. *Special Rules as to Records, Statutes, and Charters.*

Records cannot be varied by parol, § 980.

And so of statutes and charters, § 980 *a*.

Otherwise as to acknowledgment of sheriffs' deeds, § 981.

¹ Supra, § 593.

² R. v. Toshack, T. & M. 207; 1 Den. C. C. 492; R. v. Ray, L. R. 1

C. C. 257; Com. v. Ray, 3 Gray, 441; People v. Shall, 9 Cow. 778.

Record imports verity, § 982.

But on application to court, record may be corrected by parol, § 983.

For relief on ground of fraud, petition should be specific, § 984.

Fraudulent record may be collaterally impeached, § 985.

When silent or ambiguous record may be explained by parol, § 986.

Town records subject to same rules, § 987.

Former judgment may be shown to relate to a particular case, § 988.

Nature of cause of action may be proved, § 989.

So of hour of legal procedure, § 990.

So of collateral incidents of records, § 991.

III. *Special Rules as to Wills.*

Wills cannot be varied by parol. Intent must be drawn from writing, § 992.

When primary meaning is inapplicable to any ascertainable object, evidence of secondary meaning is admissible, § 996.

When terms are applicable to several objects, evidence admissible to distinguish, § 997.

In ambiguities, all the surroundings, family, and habits of the testator may be proved, § 998.

All the extrinsic facts are to be considered, § 999.

When description is only partly applicable to each of several objects, then declarations of intent are inadmissible, § 1001.

Evidence admissible as to other ambiguities, § 1002.

Erroneous surplusage may be rejected, § 1004.

Patent ambiguities cannot be resolved by parol, § 1006.

Ademption of legacy may be proved by parol, § 1007.

Parol proof of mistake of testator inadmissible, § 1008.

Fraud and undue influence may be so proved, § 1009.

Testator's declarations primarily inadmissible to prove fraud or compulsion, § 1010.

But admissible to prove mental condition, § 1011.

Parol evidence inadmissible to sustain will when attacked, § 1012.

Probate of will only *prima facie* proof, § 1013.

IV. *Special Rules as to Contracts.*

Prior conference merged in written contract, § 1014.

Parol may prove contract partly oral, § 1015.

Oral acceptance of written contract may be so proved, § 1016.

Rescission of one contract and substitution of another may be so proved, § 1017.

Exception at law as to writings under seal, § 1018.

Parol evidence admissible to reform a contract on ground of fraud, § 1019.

So as to concurrent mistake, § 1021.

But not ordinarily to contradict document, § 1022.

Reformation must be specially asked, § 1023.

Under statute of frauds parol contract cannot be substituted for written, § 1025.

Collateral extension of contract may be proved by parol, § 1026.

Parol evidence inadmissible to prove unilateral mistake of fact, § 1028.

And so of mistake of law, § 1029.

Obvious mistake of form may be proved by parol, § 1030.

Conveyance in fee may be shown to be a mortgage, § 1031.

But evidence must be plain and strong, § 1033.

Admission of such evidence does not conflict with statute of frauds, § 1034.

Resulting trust may be proved by parol, § 1035.

So of other trusts, § 1038.

Particular recitals may estop, § 1039.

Otherwise as to general recitals, § 1040.

Recitals do not bind third parties, § 1041.

Recitals of purchase money open to dispute, § 1042.

Consideration may be proved or disproved by parol, § 1044.

Seal imports consideration, but may be impeached on proof of fraud or mistake, § 1045.

Consideration in contract cannot *primâ facie* be disputed by those claiming under it, though other consideration may be proved in rebuttal of fraud, § 1046.

When fraud is alleged, stranger may disprove consideration, § 1047.

And so may *bonâ fide* purchasers and judgment vendees, § 1049.

V. *Special Rules as to Deeds.*

Deeds not open to variation by parol proof, § 1050.

Acknowledgment may be disputed by parol, § 1052.

Between parties, deeds may be varied on proof of ambiguity and fraud, § 1054.

Deeds may be attacked by *bonâ fide* purchasers, and judgment vendees, § 1055.

And so as to mortgages, § 1056.

Deed may be shown to be in trust, § 1057.

(As to recitals, see §§ 1039–1042.)

VI. *Special Rules as to Negotiable Paper.*

Negotiable paper not susceptible of parol variation, § 1058.

Blank indorsement may be explained, § 1059.

Relations of parties with notice may be varied by parol, and so may consideration, § 1060.

Real parties may be brought out by parol, § 1061.

Ambiguities in such paper may be explained, § 1062.

VII. *Special Rules as to other Instruments.*

Releases cannot be contradicted by parol, § 1063.

Receipts can be so contradicted, § 1064.

Exception as to insurance receipts, § 1065.

Receipts may be estoppels as to third parties, § 1066.

Bonds may be shown to be conditioned on contingencies, § 1067.

Subscriptions cannot be modified as to third parties by parol, § 1068.

Bills of lading are open to explanation, § 1070.

It may be added that a letter whose object is, it is claimed, to extort money,

but which is ambiguous on its face, State *v.* Linthicum, 68 Mo. 60. The
may be explained by extraneous facts, prosecution, to whom the letter was
as well as by other declarations of the sent, may be asked what appeared to
writer. R. *v.* Tucket, 1 Mood. C. C. him its meaning. R. *v.* Tucket, 1
184; R. *v.* Cooper, 8 Cox C. C. 547; Mood. C. C. 134.

CHAPTER XIII.

CONFESSIONS.

I. GENERAL CHARACTERISTICS.

Confessions not strictly evidence, § 623.

Must relate to existing conditions, § 624.

When extra-judicial do not conclude, § 625.

Intent necessary to give weight to, § 626.

Credibility a question of fact, § 627.

Confession of guilt deductive: admission of a fact inductive, § 628.

Confession to be brought home to party charged, § 629.

Imperfection of medium to be considered, § 630.

Confessions when voluntary generally admissible, § 631.

But without proof of *corpus delicti* inadequate, § 632.

Meaning of *corpus delicti*, § 633.

Credibility to be tested objectively, § 634.

And also subjectively, § 635.

And so as to terms of statement, § 636.

Confessions of adultery to be closely scrutinized, § 637.

II. JUDICIAL CONFESSIONS.

Confessions by plea conclusive, § 638.

So of pleas of abatement, § 639.

In pleading that which is not disputed is admitted, § 640.

Pleadings in other cases may be admissions, § 641.

And so of process, § 642.

III. WRITTEN CONFESSIONS.

Written confessions entitled to peculiar weight, § 643.

Letters are thus admissible, § 644.

So of telegrams, § 645.

IV. ADMISSIBILITY OF CONFESSIONS AS DETERMINED BY THREATS OR PROMISES.

Confession induced by threats is inadmissible, § 646.

Mere adjuration to speak the truth does not exclude, § 647.

Nor does a statement of the wrongfulness of concealing, § 648.

Nor the bare fact of the confession being made to a person in authority, § 649.

But confession induced by authoritative promises is inadmissible, § 650.

Promise must be made by person in authority, § 651.

Promise made by master does not exclude when offence does not concern master, § 652.

Condition of party confessing is to be considered, § 653.

Mere advice does not exclude, § 654.

Nor does expectation of compromise, § 655.

Confession of accomplice called as state's evidence cannot be used against him, § 656.

Collateral inducement does not exclude, § 657.

Issue is whether the influence applied was such as to lead to a false statement, § 658.

Assurances of secrecy do not exclude, § 659.

Nor do spiritual inducements, § 660.

When duress excludes, § 661.

Answers to interrogatories admissible, § 662.

Even when questions are leading, § 663.

Not excluded by the fact that the statement was under oath, § 664.

Otherwise when compelled to answer under oath, § 665.

Examination of prisoner when admissible, § 666.

Parol evidence of written examination inadmissible, § 667.

Answers under oath are inadmissible, § 668.

Otherwise as to voluntary statements, § 669.

Artifice does not exclude, § 670.

Not necessary that the inducement should be held out directly to the defendant, § 671.

Presence of person in authority does not necessarily exclude, § 672.

Apparent authoritative influence should be applied, § 673.

What expressions are to be construed as likely to produce a false confession, § 674.

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Confessions during sleep inadmissible, § 675.

How far drunkenness excludes, § 676.

VI. HOW FAR ORIGINAL IMPROPER INFLUENCE VITIATES SUBSEQUENT CONFESSIONS.

When influence ceases confession becomes admissible, § 677.

VII. HOW FAR EXTRANEOUS FACTS REACHED THROUGH AN INADMISSIBLE CONFESSION MAY BE RECEIVED.

Extraneous facts reached through an inadmissible confession may be proved, § 678.

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But not so when accused was not in a position to speak, § 680.

And not so as to parties hearing testimony of witness, § 681.

Letters in possession of a party not admissible against him, § 682.

Admissions may be by acts, § 683.

IX. WHAT CONFESSIONS MAY PROVE.

Party's admission may prove contents of writing, § 684.

Confession not excluded because party could be examined, § 685.

May prove marriage, § 686.

But not record facts, § 687.

X. HOW CONFESSIONS ARE TO BE CONSTRUED.

Whole confession must be proved, § 688.

XI. HOW ADMISSIBILITY IS TO BE DETERMINED.

Question of admissibility is for court, § 689.

XII. SELF-SERVING DECLARATIONS.

Self-serving declarations inadmissible for defendant, § 690.

Exception as to *res gestae*, § 691.

Coincident declarations admissible to prove authority, § 692.

And so as to state of party's mind, § 693.

Weight of self-serving declarations, § 694.

XIII. AGENTS.

Admissions of agents are receivable, § 695.

Wrongful act of agent not imputable without proof of criminal design in principal, § 696.

And so of admissions of attorney and referee, § 697.

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Declarations of admissible against each other, § 698.

Order of testimony, § 698 a.

Not admissible after conspiracy is at an end, § 699.

Rule not affected by the parties being co-defendants, § 700.

Decoy not a co-conspirator, § 700 a.

Form of prosecution not material, § 701.

Principal's acts admissible against accessory, § 702.

Declarations of co-conspirators in each other's favor, § 703.

I. GENERAL CHARACTERISTICS.

§ 623. A CONFESSION is rather a fact to be proved by evidence than evidence to prove a fact. It is not so much proof that a particular thing took place, as it is a waiver by the party charged of his right to have certain facts alleged against him technically proved. A., for instance, is shown to have said that certain facts implicating him actually took place. Were this statement by A. offered as evidence of such facts, it would be merely hearsay, and would be inadmissible. But it is not offered to prove the facts, but to show that A. has dispensed with their proof. They are assumed by the prosecution, and admitted by the defence. A confession, therefore, which involves such admission, is not, to adopt the words of the Roman law, *probatio*, but *levamen probationis*.¹

Confessions not strictly "evidence."

§ 624. A confession to have the effect of conceding, either wholly or *primâ facie*, the case of the prosecution, must relate to a past or present state of facts. If I say, "I did a particular thing," this may be treated as a confession. If I say, "I will do this thing in the future," this is not a confession, unless, with other evidence, it implies a past act. Relevancy to past or existing conditions is, therefore, an essential requisite of the admissibility of a confession.²

A confession must relate to existing conditions.

§ 625. An extra-judicial confession forms but a *primâ facie* case against the party by whom it is made.³ As will hereafter be more fully seen, such confessions are not conclusive proof of that which they state;⁴ they may be neutralized by proof that they were uttered in ignorance, or levity, or mistake;⁵ and hence they are, at the best, to be regarded as only cumulative proof, which affords but a

Extra-judicial confessions do not conclude.

¹ See Bald. in L. 8 Cod. iv. 30, qu. 10; Mascard. i. qu. 7, nr. 11; Pacian, L. C. 11, nr. 10; Endemann, 135.

² State v. Cox, 65 Mo. 29.

³ Mascard. i. C. No. 26; Endemann, 137. See Whart. on Ev. § 1077.

⁴ That a defendant is to be permitted to impugn even a written confession of guilt see State v. Brown, 1

Mo. Ap. 86. On the other hand, it has been held to be inadmissible for him to show that he afterwards denied having made the confession. Ray v. State, 50 Ala. 194. And this is good law in those States in which he could be put in the witness-box to prove such denial under oath.

⁵ Infra, §§ 634-6.

precarious support, and on which, when uncorroborated, a verdict cannot be permitted to rest. This is eminently the case where there is any suspicion attachable to the confession, as is the case with admissions of adultery;¹ or where the party against whom it is offered made it under a mistake of fact. Whenever such a mistake is proved, the confession, as we will hereafter see more fully, is to be disregarded.² And the same rule applies to an admission of an act technically void. Thus on an indictment for setting fire to a ship, it was held that the prosecutor could not make use of an admission by the prisoner that certain persons were owners, if it appeared that the requisites of the Shipping Act had not been complied with.³ It has also been held that an admission of a marriage, which turned out to be void, cannot be used against a defendant charged with bigamy.⁴

§ 626. Extra-judicial confessions, as we will hereafter notice more in detail, may be adduced either as admissions of guilt, or as admissions of isolated facts from which guilt may be inferred. When offered for the former purpose, they have no weight unless they were made intentionally and in sincerity;⁵ and hence it is admissible, in order to impugn a confession, to show that it was made as a joke. We must also remember that an alleged confession may have been only a brag, understood by the parties to be such at the time,⁶ or, as will be seen in the next section, may have been uttered in order to make a sensation. If so, it cannot be made the basis on which a conviction can be sustained, since on its face its want of truthfulness appears. To the credibility of a confession of guilt, therefore, it is necessary that there should be an *animus confitendi*, or intention to speak the truth as to

¹ *Infra*, § 637; *Lyon v. Lyon*, 62 Barb. 138; *Prince v. Prince*, 25 N. J. Eq. 310; *Evans v. Evans*, 41 Cal. 103; *Mathews v. Mathews*, 41 Tex. 331.

² See cases cited *infra*, § 634; and compare *R. v. Wheeler*, 1 Leach C. C. 311; *Herne v. Rogers*, 9 B. & C. 577; *Newton v. Belcher*, 1 Q. B. 921; *Newton v. Liddiard*, 12 Q. B. 927; *Atty. Gen. v. Stephens*, 1 Kay & J. 748; *Hall v. Huse*, 10 Mass. 39; *State v. Welsh*, 7 Porter, 463; *State v.*

Brown, 1 Mo. Ap. 86. See however, as attaching higher weight, *Blackburn v. Com.* 12 Bush, 181.

³ *R. v. Philp*, 1 Mood. C. C. 271.

⁴ 3 Stark. Ev. 1187.

⁵ *Ray v. State*, 50 Ala. 104.

⁶ See cases as holding that false "puffs" are not false pretences, *R. v. Hamilton*, 9 Q. B. 270; *State v. Estes*, 46 Me. 150; *People v. Crissie*, 4 Denio, 525; *State v. Phifer*, 65 N. C. 321. See fully *infra*, § 627.

the specific charge of guilt. Such intention, however, is not essential to attach credibility to admissions of particular facts, in themselves indifferent, but which go to make up a case on which guilt is assumed to rest.¹ It is part of the case against a defendant, for instance, that he rode from place to place in a given time. It is admissible to put in evidence against him his admissions, that on other occasions his horse had a speed which, it might afterwards have been argued, would have enabled him to make the time in question. And it is not necessary to the admissibility of such statements that it should be proved that they were made with any particular intention.² In fact, the more undesigned and fortuitous they appear to have been, the more likely they are to be true.³ Hence we may conclude that designedness is one of the conditions of the credibility of a confession of the conclusion of guilt; while undesignedness enhances the weight of admissions of incidental facts from which the conclusion of guilt is drawn. A man cannot be convicted of forgery on an inadvertent statement made by him, not in response to any particular charge, that he was a forger. But his conviction may properly be rested on a series of inadvertent acts on his part not meant as confessions: *e. g.* writings or other matters showing an identity of penmanship with that of the alleged forgery, and the materials for forgery which he may have exposed.

§ 627. The credibility of a self-disserving confession of guilt, therefore, as distinguished from incidental admissions of facts, is a question of fact resting on the presumption Credibility
a question
of fact. that no prudent man would declare an untruth to his own disadvantage.⁴ “*Quum legibus nostris dictum sit, quaecunque quis pro se dixerit aut scripserit, ea nihil ipsi prodesse, neque creditoribus praejudicare.*”⁵ “*Exemplo perniciosum est, ut ei*

¹ *Fraser v. State*, 55 Ga. 325; *State v. Lewis*, 45 Iowa, 20.

² *Fraser v. State*, 55 Ga. 325. *Supra*, § 625.

³ *Linnehan v. Sampson*, 126 Mass. 506.

⁴ *Com. v. Galligan*, 113 Mass. 202; *Com. v. Sanborn*, 116 Mass. 61; *Blackburn v. Com.* 12 Bush, 181; *Ei-*

land v. State, 52 Ala. 522. And see *Brown v. Com.* 76 Penn. St. 319, noticed, *infra*, § 629.

It is on this ground that confessions are excluded whenever it appears that they were induced by promises. *Infra*, § 650.

⁵ *Hesse*, 29.

scripturae credatur, qua unusquisque sibi adnotatione propria debitorem constituit. Unde neque fiscum neque alium quemlibet *ex suis subnotationibus* debiti probationem praeberere posse oportet.”¹ Hence “*contra se dicere*” is essential to constitute a credible confession of guilt. Self-love, so it is justly argued, will hinder a prudent man from falsehoods that would disgrace him.² Yet we must remember that this proposition applies mainly to matters of pecuniary interest. When we come to questions of pedigree, of *status*, and of marriage, different influences come in which render the tests just given of but little weight. In matters of pedigree, in particular, a statement which one man would shrink from as discreditable, another would advance with pride. Nor can we forget that pecuniary interest may sometimes be overbalanced by other more powerful passions. A villain may try to make a point by falsely confessing adultery with a woman whom he desires to humble;³ while a person craving notoriety may take much satisfaction in intimating his complicity in merely imaginary crimes. Even among prudent men, a little obvious interest, against which a party makes an admission, may be greatly overbalanced by a superior secret interest, of which nobody knows but the declarant. The truthfulness, therefore, of an apparently self-disserving statement is a presumption of fact, depending upon all the circumstances of the case. We must inquire whether the statement was really self-disserving, and even if it were so, in a business sense, we must remember that it may be discredited by showing that it was made under mistake, or from a desire on the declarant’s part to produce a sensation, or to avoid a disclosure of a fact with which the admission is inconsistent. Incidental admissions of facts on which the prosecution’s case depends become the more reliable, as we have just seen, in proportion to their undesignedness. But to the credibility of confessions of guilt it is essential that they should have been made with a sincere intention of telling the truth.⁴

¹ L. 7. C. 4. 19.

² Hesse, *ut supra*, 29; citing further L. 26. § 2; D. xvi. 3.

³ As illustrations of false confessions of adultery may be mentioned the charges brought against Anne Hyde, Duchess of York, by parties who

sought in this way to prevent her husband from acknowledging her as his wife. A remarkable instance of a similar false charge is to be found in Shillito’s case, noticed in Alb. L. J. Feb. 28, 1880.

⁴ “I had a client, David Haggart,

§ 628. We have just had occasion to notice that while to a confession of guilt intention pointed to a particular charge is necessary, such is far from being the case with the incidental admissions of isolated facts, which derive their peculiar reliability from their inadvertence. Another distinction is now to be considered. A confes-

Confession
of guilt
deductive:
admission
of fact in-
ductive.

who was hanged at Edinburgh for murdering his jailer at Dumfries. He was young, good-looking, gay and amiable to the eye; but there was never a riper scoundrel — a most perfect miscreant in all the darker walks of crime. Nevertheless his youth (about twenty-five) and apparent gentleness, joined to an open confession of sins, procured him considerable commiseration, particularly among the pious and the female sex. He employed the last days of his existence in dictating memoirs of his life, with a view to publication. The book was published; and my copy contains a drawing of himself in the condemned cell, by his own hand, with a set of verses, his own composition, which he desired to be given to me in token of his gratitude for my exertions at his trial. Well, the confessions and the whole book were a tissue of absolute lies — not of mistakes, or exaggerations, or fancies, but of sheer and intended lies. And they all had one object — to make him appear a greater villain than he really was. Having taken to the profession of crime, he wished to be at the head of it. He wanted to die a great man. He therefore made himself commit crimes of all sorts, which, as was ascertained by inquiry, were never committed at all. *A strange pride; yet not without precedent, and in nobler walks of criminal ambition.*” Cockburn’s Memorials, i. 141.

From the same author comes the following additional illustration: —

“ On the 13th of November, 1806,

a murder was committed in Edinburgh, which made a greater impression than any committed in our day, except the systematic murders of Burke. James Begbie, porter to the English Linen Company’s Bank, was going down the close in which the bank then was, on the south side of the Canongate, carrying a parcel of bank notes of the value of four or five thousand pounds, when he was struck dead by a single stab, given by a single person who had gone into the close after him, and who carried off the parcel. This was done in the heart of the city, about five in the evening, and within a few yards of a military sentinel, who was always on guard there, though not exactly at this spot, and at the moment possibly not in view of it. Yet the murderer was never heard of. The soldier saw and heard nothing. All that was observed was by some boys who were playing at hand-ball in the close; and all that they saw was that two men entered the close as if together, the one behind the other, and that the front man fell, and lay still; and they, ascribing this to his being drunk, let him lie, and played on. It was only on the entrance of another person that he was found to be dead, with a knife in his heart, and a piece of paper, through which it had been thrust, interposed between the murderer’s hand and the blood. The skill, boldness, and success of the deed produced deep and universal horror. People trembled at the possibility of such a murderer being in the midst of them, and

sion of guilt is of no weight unless it is a short-hand admission of facts ; an admission of an incidental fact is of no weight unless it afford a basis for an induction of guilt. The first is inoperative unless, as an answer to a particular offence charged, it implies a specification which is sufficiently exact to sustain a conviction. The second is inoperative unless it is supported collaterally by a series of other facts from which guilt may be cumulatively inferred. The first is, "I am guilty of this," and this implies an admission of all the acts constituting guilt. The second is,

taking any life that he chose. But the wretch's own terror may be inferred from the fact, that in a few months the large notes, of which most of the booty was composed, were found hidden in the grounds of Bellevue. Some persons were suspected, but none on any satisfactory ground; and, according to a strange craze or ambition not unusual in such cases, several charged themselves with the crime who, to an absolute certainty, had nothing to do with it." See further illustrations *infra*, § 634.

Lord Clarendon tells us of a Frenchman named Hubert who was convicted and executed on a most circumstantial confession of his guilt, in having occasioned the great fire in London, "although," adds the historian, "neither the judges nor any one present believed him guilty, but that he was a poor, distracted wretch, weary of life, and who chose to part with it in that way." Continuation of Lord Clarendon's Life, written by himself, p. 352. And so Bunyan tells us of a case where the confession was also evidently the result of a disordered mind: "Since you are entered upon stories, I will also tell you one, the which, though I heard it not with my own ears, yet my author I dare believe: It is concerning one old *Tod*, that was hanged about twenty years ago, or more, at *Hartford*, for being a thief. The story is this: At a sum-

mer assize holden at *Hartford*, while the judge was sitting upon the bench, comes this old *Tod* into the court, clothed in a green suit, with his leathern girdle in his hand, his bosom open, and all in a dung sweat as if he had run for his life; and being come in, he spake aloud as follows: *My Lord*, said he, *here is the veryest rogue that breathes upon the face of the earth ; I have been a thief from a child : when I was but a little one, I gave myself to rob orchards, and to do other such like wicked things, and I have continued a thief ever since. My Lord, there has not been a robbery committed this many years, within so many miles of this place, but I have either been at it or priry to it. The judge thought the fellow was mad; but after some conference with some of the justices. they agreed to indict him, and so they did, of several felonious actions; to all which he heartily confessed guilty, and so was hanged with his wife at the same time."*

For information as to the confessions of the New England witches in 1689-92 see the 7th chapter of the 6th book of Cotton Mather's *Magnalia Christi Americana*; Governor Hutchinson's *History of Massachusetts*, ii. pp. 15, 63; *State Trials*, vol. v. pp. 647, 682; Upham's *Lectures on the Salem Witchcraft*, Boston, 1831. Two English cases are given in *Best's Evidence*, 5th ed. App. p. 839.

“Such an act, part of a complicated web of circumstances, is true;” and this involves the examination of all other relevant circumstances. Relevancy in the first case is sustained by deductive reasoning: Whosoever is guilty of the result is guilty of the acts making up the result; in the second case by inductive reasoning: Whosoever did the component facts is guilty of the result. As to the first, we must remember that the party confessing may himself have reasoned falsely. He may have shot a man already dead, for instance, and may therefore, by assuming a false premise, confess a murder which he did not commit. As to the second, we must remember that *we* may reason falsely.¹ The inculpatory facts admitted by the accused may be true, and yet we may be in error in supposing they are grounds from which his guilt may be rightly inferred.²

§ 629. A confession must be brought specifically home to the party charged with making it, and, independently of the cases, to be hereafter discussed, in which parties are induced through fear to make statements which are not really their own, we may easily conceive of cases of forged confessions, or confessions by one man imputed by mistake to another. The person alleged to have confessed, therefore, must be identified as the party to whom the confession is charged. But the identification may be by voice as well as by face. Thus it has been held in Pennsylvania that a prisoner could testify to a confession from another prisoner through a soil pipe, the identification of the speaker being by the voice alone.³

§ 630. The imperfection of the medium through which an oral confession is transmitted must also be considered in weighing the confession. Aside from the considerations based on the infirmity of memory, we must recollect that there are influences peculiarly likely to affect witnesses as to confessions. Partisan sympathy, preconceived prejudice, the desire to detect an offender, especially in cases of heinous crime, are apt in such cases to have distinctive force. In any view, we must remember that the accuracy of the witness testifying to the confession is a question of fact for the jury.⁴

¹ See *supra*, § 378; *infra*, § 635.

³ *Brown v. Com.* 76 Penn. St. 319.

² See *Haynie v. State*, 2 Tex. Ap. 168.

⁴ See *Com. v. Gallighan*, 113 Mass. 202. See *supra*, § 378.

§ 631. Subject to the qualifications we have just noticed, the rule is firmly established that a free and voluntary confession either of an offence as specifically charged, or of a fact from which such offence can be inferred, whether made before or after apprehension, and whether in writing, or in unwritten words, or by signs, is admissible when offered against the accused, no matter where or to whom it was made.¹

Voluntary
confession
is admissi-
ble.

§ 632. Admissibility, however, is to be distinguished from sufficiency. While voluntary confessions of specific charges or of inculpatory facts are always admissible, under the conditions above stated, they cannot sustain a conviction, unless there be corroborative proof of the *corpus delicti*.²

But with-
out proof
of *corpus
delicti* in-
sufficient.

¹ Per Grose, J., Lambe's case, 2 Leach C. C. 625; 2 Hawk. P. C. c. 46; Com. v. Sanborn, 116 Mass. 61; State v. Brown, 48 Iowa, 553, and cases hereafter cited.

² Wills Cir. Ev. § 6; 1 Greenl. Ev. § 316; State v. Davidson, 30 Vt. 377; Com. v. McCann, 97 Mass. 580; Com. v. Smith, 119 Mass. 305; People v. Hennessey, 15 Wend. 147; People v. Badgeley, 16 Wend. 53; Ruloff v. People, 18 N. Y. 179; S. C., 3 Parker C. R. 401; People v. Bennett, 49 N. Y. 137; Com. v. Pettit, 8 Phil. 608; Com. v. Hanlon, 3 Brewst. 461; Smith v. Com. 21 Grat. 809; State v. Long, 1 Hayw. 455; State v. Cowan, 7 Ired. 239; Earp v. State, 55 Ga. 136; Matthews v. State, 55 Ala. 187; Johnson v. State, 59 Ala. 37; Keithler v. State, 10 S. & M. 229; Stringfellow v. State, 26 Miss. 157; Jenkins v. State, 41 Miss. 582; Lee v. State, 45 Miss. 114; Robinson v. State, 12 Mo. 592; State v. Scott, 39 Mo. 424; State v. Gorman, 54 Mo. 526; Dixon v. State, 13 Fla. 636; Bergen v. People, 17 Ill. 426; State v. Keeler, 28 Iowa, 553; State v. Knowles, 48 Iowa, 598; State v. Laliyer, 4 Minn. 368; People v. Jones, 31 Cal. 565; People v. Ah How, 34 Cal. 218; People

v. Thrall, 50 Cal. 415; Territory v. McClintock, 1 Mont. 304.

As attaching a higher efficiency to confessions see State v. Guild, 5 Halst. 165; Rice v. State, 47 Ala. 38; Moses v. State, 58 Ala. 117. In Kentucky the rule in the text is established by statute. Cunningham v. Com. 9 Bush, 149.

In preliminary examinations a naked confession is enough to warrant a holding the defendant for trial. U. S. v. Bloomgart, 2 Benedict, 356.

Mr. Taylor (Evidence, § 794) argues that in each of the English cases usually cited in favor of the sufficiency of this evidence (uncorroborated confessions) some corroborating circumstance will be found. See R. v. Sutcliffe, 4 Cox, 270. Thus, in the case of Eldridge (R. & R. 440), who was indicted for horse-stealing, the horse was found in his possession, and he had sold it for £12, after asking £35, which was its fair value. In the case of Falkner and Bond (Ibid. 481), the person robbed was called upon his recognizance, and it was proved that one of the prisoners had endeavored to send a message to him to keep him from appearing. In White's case (Ibid. 508), there was strong circumstantial

§ 633. It should be remembered that the *corpus delicti* consists not merely of an objective crime, but of the defendant's agency in the crime ;¹ and unless the *corpus delicti* in both these respects is proved, a confession is not by itself enough to sustain a conviction. This is strikingly illustrated in a trial in Mississippi, where the evidence was that the circumstances of the deceased's death, and the state of his body, indicated poison by stramonium, or Jamestown weed ; but that the same symptoms might have been caused by congestions of the brain, stomach, or heart ; and it was properly ruled by the court, that a confession of the defendant, that he had administered to the deceased Jamestown weed, was not enough to warrant a conviction, the *corpus delicti* not being fully proved.²

§ 634. To confessions, so far as concerns credibility, are to be applied most of the tests we have already noticed as applicable to the testimony of witnesses. On a prosecution of A., for instance, it is offered to prove that some weeks prior to trial A. narrated certain inculpatory transactions in which he was concerned. We have, therefore, two distinct periods of time to be kept in view. The first is that of the occurrence of the inculpatory transaction. Did the objects described by the witness actually exist at the time, or did they

Meaning
of *corpus
delicti*.

Credibil-
ity to be
tested ob-
jectively.

evidence, both of the larceny of the oats from the prosecutor's stable, and of the prisoner's guilt ; and in the case of Tippet (*Ibid.* 509), who was indicted for the same larceny, part of this evidence was also given, together with the additional proof that the prisoner was an under-hostler in the same stable. In all these cases, too, except that of Falkner and Bond, the confessions were solemnly made before the examining magistrate, and taken down in due form of law ; while the confessions of Falkner and Bond were repeated, once to the officer who apprehended them, and again on hearing the depositions read over which contained the charge. So in Stone's case, which is a very brief note, it does not appear that the *corpus delicti*

was not otherwise proved ; on the contrary, the natural inference from the report is that it was. Wheeling's case, indeed, seems to be an exception ; but it is far too briefly reported to be relied on as an authority, for it merely states that "in the case of John Wheeling, tried before Lord Kenyon, at the Summer Assizes at Salisbury, 1789, it was determined that a prisoner may be convicted, on his confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence."

¹ *Supra*, § 325 ; *Com. v. Johnson*, 21 Grat. 811 ; *Merritt v. State*, 2 Tex. Ap. 177 ; *Davis v. State*, 2 Tex. Ap. 588.

² *Pitts v. State*, 43 Miss. 472.

exist only apparently? A person is wounded, for instance, and is left for dead by the assailant, and the assailant confesses afterwards that he murdered the supposed deceased.¹ But unless a real crime is proved to have been committed, the confession, as we have seen, is inoperative.² The same observation may be made as to statements, under a mistake of law, of non-existent facts as if they really exist.³

§ 635. We must also, applying the same tests as we have already applied to witnesses, inquire whether the defendant, at the time of the occurrence narrated, was capable of accurate observation.⁴ If he was drunk at such time the narration is entitled to little credit.⁵

¹ As illustrating the text may be mentioned the following cases:—

Two brothers named Boorns, who, on being charged in Vermont with the murder of a man whose body was alleged to have been identified, were convicted and sentenced to death, chiefly on their admissions, were relieved from execution by the reappearance of their alleged victim. N. Am. Review, vol. x. p. 418; 5 Law Reporter, 195; 1 Greenl. on Ev. § 214; 1 Wh. & St. Med. J. § 200 a. Supra, § 325, infra, § 804.

In Illinois, in 1841, three brothers named Traylor were arrested on the charge of murdering a man named Fisher, who, when last seen, had been in their company. Strong circumstantial evidence was produced showing the traces of a death struggle in the spot where the homicide was alleged to have been committed; and the case was fortified by expressions alleged to have been subsequently used by one of the brothers as to his having become legatee of the deceased's property. The examination had scarcely finished, before one of the three defendants made a confession, detailing circumstantially the whole transaction, showing the previous combination, and ending with a direct state-

ment, under oath, of the homicide. Fisher, however, made his appearance in just time enough to intercept a conviction; and the only way of accounting for the confession which had been produced was, that the party who made it, in the desperation of impending conviction, took this method of cutting short suspense. See 4 Western Law Journal, 25; Lamon's Life of Lincoln, cited in 1 Wharton & St. Med. Jur. § 794.

² For cases see supra, §§ 625, 626–632.

³ Supra, § 625.

⁴ Supra, §§ 373, 374.

⁵ Supra, § 384 a; infra, § 675.

Mr. Abercrombie relates the following instance where a *quasi* confession was made by an innocent person, which shows also that it may not be impracticable for an artful man to so operate upon the nervous sensibility of another less intelligent, as to lead the latter to declarations or conduct which would produce a strong presumption of guilt. During an investigation in Scotland, respecting an atrocious murder committed on a pedler, a man came forward voluntarily and declared that he had had a dream, in which there was represented to him a house, and a voice directed him to a spot near

§ 636. A person, also, in narrating a past transaction, may be without the power of due expression, or may express himself so as to be misunderstood.¹ We have, there And so as to terms of statement. fore, to consider, in addition to the declarant's capacity of observation and of narration, what is the real meaning of his words. In determining, therefore, whether a confession of guilt by a party under mental excitement or prostration is true, allowance must be made for such incapacitating conditions.² The same qualification, though in less force, is applicable to incidental admissions of inculpatory facts.

§ 637. In addition to the considerations first mentioned, there are peculiar reasons for applying a close criticism to confessions of adultery. Such confessions may be a Peculiar stringency in confessions of adultery. convenient mode of getting rid of the marriage tie, or may be induced by a desire to injure another, or to gratify a base vanity, and may be made, therefore, without solid foundation. Hence such confessions, unless corroborated, are not usually regarded as ground for divorce.³

II. JUDICIAL ADMISSIONS.

§ 638. A *confessio*, to be *judicialis*, must be before a court competent to try the pending prosecution, in which the proceedings must be regularly brought. Nor is the confession conclusive if in an *ex parte* proceeding; it Confessions by plea conclusive.

the house, in which there was buried the pack, or box for small articles of merchandise, of the murdered person. On search being made, the pack was found, not precisely on the spot which he had mentioned, but very near it. The first impression on the minds of the public authorities was that he was either the murderer or an accomplice in the crime. But the individual accused was soon after clearly convicted; and before his execution he fully confessed his crime, and in the strongest manner exculpated the dreamer from any participation in, or knowledge of, the murder. The only fact that could be discovered calculated to throw any light upon the occurrence was, that

immediately after the murder the dreamer and the murderer had been together in a state of almost constant intoxication, for several days: and it is supposed that the latter might have allowed statements to escape from him which had been recalled to the other in his dream, though he had no remembrance of them in his sober hours. Abercrom. on the Intellect. Powers, 12th ed. 222. See 1 Whart. & St. Med. Jur. § 200 a.

¹ See *State v. Long*, 1 Hayw. 455. Supra, § 374.

² Infra, §§ 675-6.

³ See, for full citation of cases, Whart. on Ev. § 637. See also supra, § 627, as to false confessions of adultery.

must be on an issue accepted by both prosecution and defence.¹ *Absente adversario*, the confession is operative only *quae solam voluntatem confitentis declarat*, or *in his quae dependent solum ex voluntate confitentis*.² But when formally made, under such circumstances, a judicial confession is conclusive as to the issue, unless shown to have been made by mistake or to have been secured by fraud.³ And it may be used against the party making it in all other cases in which it is relevant, though it may not in such cases work an estoppel.⁴ A plea of guilty, however, withdrawn by permission of the court, does not so bind.⁵ And a plea by the defendant's attorneys, such plea being signed only by them and rejected by the court, cannot be used as a confession.⁶ Nor can a plea of guilty be binding if made by a person incompetent by reason of infancy.⁷

§ 639. In criminal pleading, a plea of abatement binds the party making it to the allegations it contains, and unless it be withdrawn, these allegations cannot be repudiated by him.⁸ When a plea of abatement is decided against a defendant, in this country the defendant is usually permitted to plead over.⁹

§ 640. So far as concerns the particular prosecution in which the plea is entered, it may be held that whenever a material averment well pleaded is passed over by the adverse party without denial, whether this be by pleading in confession and avoidance, or by demurring in

¹ See Whart. on Ev. § 1078.

² Mascard. concl. 348, nr. 1.

³ *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Com. v. Jackson*, 2 Va. Cas. 501; *Gridley v. Conner*, 4 La. An. 416; *Denton v. Erwin*, 5 La. An. 18; *Edson v. Freret*, 11 La. An. 710. See *State v. Colvin*, 11 Humph. 599.

⁴ *R. v. Fontaine Moreau*, 11 Q. B. 1033; *Bradley v. Bradley*, 2 Fairf. 367; *Perry v. Simpson Co.* 40 Conn. 313.

⁵ *R. v. Brown*, 17 L. J. M. C. 143; *State v. Cotton*, 4 Foster, 143. See *State v. Salge*, 2 Nev. 321. See supra, § 615.

⁶ *Com. v. Lannan*, 13 Allen, 563.

⁷ *R. v. Stone*, 1 F. & F. 311; *R. v. Simmonds*, 4 Cox C. C. 277.

⁸ 2 Hale, 176, 238; Burn, Indictment, ix.; *State v. Dresser*, 54 Me. 569; *Com. v. Gale*, 11 Gray, 320; *Lewis v. State*, 1 Head, 329. The judgment for the defendant is no bar to an indictment against him in his true name. *Com. v. Farrell*, 105 Mass. 187. See supra, §§ 94, 582.

⁹ *U. S. v. Williams*, 1 Dillon, 485. In England, the liberty is limited to cases where the plea is to matter of law. *R. v. Johnson*, 6 East, 583; *R. v. Gibson*, 8 East, 107; *R. v. Duffy*, 4 Cox C. C. 190. See Whart. Cr. Pl. & Pr. §§ 423 et seq.

law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading, if not for the purpose of trial before the jury, conceded.¹ “It is a fundamental rule in pleading, that a material fact asserted on one side, and not denied on the other, is admitted.”²

§ 641. An answer under oath is to be regarded as admissible against the party making it, in all independent suits in which it is relevant.³ And a plea entered by him in another case is also collaterally admissible against him making a *prima facie* case,⁴ though it is otherwise if the defendant was incapable by infancy of binding himself by a plea.⁵

Pleadings in other cases may be admissions.

§ 642. What has been said of pleading equally applies to process. A party by issuing process *prima facie* admits the facts which such process assumes.⁶

So of process.

III. WRITTEN CONFESSIONS.

§ 643. A written statement by a defendant, when prepared deliberately and seriously, is not only admissible in evidence against him, but is of weight proportioned to its pertinency.⁷ Thus on the trial of an indictment for the malicious burning of a building, the voluntary testimony of the defendant before a fire inquest, reduced to writing and signed by him, makes a strong case against him;⁸ and so of the bank books of a bank, kept by the defendant, an officer of the bank, in the course of his business.⁹

Written confessions entitled to peculiar weight.

§ 644. A letter written by the defendant, when self-disserving,

¹ Taylor's Ev. § 748; citing Steph. Pl. 248; Jones v. Brown, 1 Bing. N. C. 484; De Gaillon v. L'Aigle, 1 B. & P. 368; Prowse v. Shipping Co. 13 Moore P. C. 484. See also State v. Homer, 40 Me. 438; Coffin v. Knott, 2 Greene (Iowa), 582.

² McAllister, J., Simmons v. Jenkins, 76 Ill. 482; citing Dana v. Bryant, 1 Gilm. 104; Pearl v. Wellman, 3 Ibid. 311; Briggs v. Dorr, 19 Johns. 95; Jack v. Martin, 12 Wend. 316; Raymond v. Wheeler, 9 Cow. 295.

³ Whart. on Ev. § 1116. Supra, § 615.

⁴ State v. Homer, 40 Me. 438.

⁵ R. v. Simmonds, 4 Cox C. C. 277; R. v. Stone, 1 F. & F. 311; and see supra, § 615.

⁶ See cases in Whart. on Ev. § 1118. Supra, § 610-11-12.

⁷ Whart. on Ev. § 1122; Abbott v. People, 75 N. Y. 602.

⁸ Com. v. Bradford, 126 Mass. 42.

⁹ Humphrey v. People, 18 Hun, 393.

is *prima facie* evidence against him ;¹ though in such case the confession, to be operative, must be distinctly to a point material to the issue.² It is not necessary to the admissibility of such a letter that it should be signed ; if traceable to the writer, and if involving a self-disserving admission of any kind, this is enough.³ Nor is it an objection that a letter stands by itself, since a letter containing a particular confession may come in alone ;⁴ nor is it necessary, when a letter is thus independent in its character, that the whole pertinent correspondence should be put in.⁵ Nor is it fatal to the admissibility of such a letter that it was in answer to a letter meant as a trap.⁶

On the other hand, letters of third parties are inadmissible when hearsay.⁷ Hence a letter addressed to a party cannot be admitted as proof against him, unless it be proved that he received it and acted on it,⁸ or in some way invited it.⁹ Whether a letter written, but not sent, can be put in evidence against a party, is elsewhere discussed.¹⁰

§ 645. Telegrams, under the same restrictions as those which have been noticed as appertaining to letters, may be also treated as constituting admissions on the part of the person by whom they are sent.¹¹ Duly proved, they may be treated as self-disserving admissions, which, so far as concerns the party from whom they emanate, are subject to the

¹ Longfellow v. Williams, Peake Add. Ca. 225; Rose v. Cunynghame, 11 Ves. 550; Gibson v. Holland, L. R. 1 C. P. 1; Wilkins v. Burton, 5 Vt. 76; Robertson v. Ephraim, 18 Tex. 118.

² Betts v. Loan Co. 21 Wis. 80.

³ Bartlett v. Mayo, 33 Me. 518.

⁴ North Berwick Co. v. Ins. Co. 52 Me. 336; Newton v. Price, 41 Ga. 186.

A letter containing an admission by a party is evidence against him, although the letter was in reply to another which the party is not called upon to produce. Wiggin v. R. R. 120 Mass. 201. See *infra*, § 688.

⁵ Whart. on Ev. § 618. *Supra*, § 521; *infra*, § 688.

⁶ R. v. Derrington, 2 C. & P. 418; U. S. v. Champagne, 1 Ben. 241; Com. v. Knapp, 10 Pick. 496; Com. v. Tuckerman, 10 Gray, 173; Price v. State, 18 Oh. St. 418. *Infra*, § 670.

⁷ Williams v. Manning, 41 How. (N. Y.) Pr. 454; Wolstenholme v. Wolstenholme, 3 Lans. 457; Rosenstock v. Tormey, 32 Md. 169; Underwood v. Linton, 44 Ind. 72; Livingston v. R. R. 35 Iowa, 555.

⁸ Smiths v. Shoemaker, 17 Wall. 630. See fully *infra*, § 682.

⁹ *Infra*, § 682.

¹⁰ Whart. on Ev. § 1123.

¹¹ See *supra*, § 521.

usual incidents of such admissions.¹ In order, however, to charge a party with a telegram, the original draft, in the handwriting of the party or his agent must be produced.² But a sender may be regarded as the employer of the telegraph company in such a sense as to make the message sent and delivered by the company primary evidence.³

IV. ADMISSIBILITY OF CONFESSIONS AS DETERMINED BY THREATS OR PROMISES.

§ 646. Not only is it an indictable offence to apply torture to another for the purpose of extorting a confession ;⁴ but all confessions so induced will be rejected, if offered to prove a case of guilt.⁵ And even when violence is not used, the mere threat to apply it in any shape works a similar exclusion. Hence, a confession will not be received if it appear, in the opinion of the court, to have been influenced by threats of physical punishment of any kind, or of any kind of pecuniary or other temporal penalty.⁶

¹ *Com. v. Jeffries*, 7 Allen, 548; *Beach v. R. R.* 37 N. Y. 457; *Taylor v. The Robert Campbell*, 20 Mo. 254; *Wells v. R. R.* 30 Wis. 605. See, to same general effect, *Beach v. Raritan & Del. Bay R. R. Co.* 37 N. Y. 457; *Coupland v. Arrowsmith*, 18 Law T. (N. S.) 75; *Henkel v. Pape*, L. R. 6 Exch. 7; *Verdin v. Robertson*, 10 Sess. Cas. (3d series) 85; *Alb. L. J.* Jan. 20, 1877.

² *Durkee v. R. R.* 29 Vt. 127; *Benford v. Zanner*, 40 Penn. St. 9; *Matteson v. Noyes*, 25 Ill. 591; *Williams v. Brickell*, 37 Miss. 682. *Supra*, §§ 162, 521.

³ *Durkee v. R. R.* 29 Vt. 127. *Supra*, §§ 162, 521. As to such agency in case of letters see *R. v. Cooper*, L. R. 1 Q. B. D. 19, cited fully *infra* § 682.

⁴ *State v. Hobbs*, 2 Tyler, 380.

⁵ *Infra*, § 661; *U. S. v. Nott*, 1 McLean, 499; *Flagg v. People*, 40 Mich. 706; *Berry v. State*, 10 Ga. 511; *Butler v. Com.* 2 Duv. 435; *Joe*

v. State, 38 Ala. 422; *Serpentine v. State*, 1 How. (Miss.) 256; *Frank v. State*, 39 Miss. 705; *Hector v. State*, 2 Mo. 135; *McGlothlin v. State*, 2 Cold. 223; *Greer v. State*, 31 Tex. 129. In *Com. v. Cuffee*, 108 Mass. 285, it was held that a confession was not excluded by the fact that the defendant, a boy of about thirteen years, was previously stripped by officers arresting without a warrant, roughly handled, and put in a cell.

⁶ *State v. Grant*, 22 Me. 171; *State v. Phelps*, 11 Vt. 116; *Com. v. Chabcock*, 1 Mass. 144; *Com. v. Drake*, 15 Mass. 161; *Com. v. Knapp*, 9 Pick. 496; *People v. Ward*, 15 Wend. 231; *People v. Rankin*, 2 Wheel. C. C. 467; *State v. Brick*, 2 Harring. 530; *Moore v. Com.* 2 Leigh, 701; *Smith v. Com.* 10 Grat. 734; *Stephen v. State*, 11 Ga. 225; *Earp v. State*, 55 Ga. 136; *Deathridge v. State*, 1 Sneed, 75; *Boyd v. State*, 2 Humph. 39; *Ann v. State*, 11 Humph. 159; *Self v. State*, 6 Bax. 244; *Garrard v. State*, 50 Miss.

As will be presently seen, a confession made under oath by a party called and compulsorily examined as a witness for the prosecution as to his own guilt cannot be afterwards used against him.¹

§ 647. But a mere adjuration to speak the truth does not vitiate a confession when neither threats nor promises are applied.² Thus when a prisoner under fourteen years of age, charged with murder, was told by a man who was present when he was apprehended, "Now kneel down; I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty," and the prisoner in consequence made a statement, this was held admissible.³ So where the mother of a young lad of eight, who was arrested by the police, said to him and another, "You had better, as good boys, tell the truth," it was held that the confession was admissible.⁴ Nor, as it has been held, is it a valid objection that the defendant had been called upon to touch the deceased's body.⁵ But where a constable, after having asked the prisoner what he had done with the stolen property, said, "You had better not add a lie to the crime of theft," Gaselee, J., refused to receive a statement thereupon made by the prisoner in evidence.⁶ The mere fact, however, that the appeal to speak the truth is made by an officer to a party under arrest, does not exclude the confession.⁷

147; *Hector v. State*, 2 Mo. 135; *Runnels v. State*, 28 Ark. 121; *Barnes v. State*, 36 Tex. 356; *Territory v. McClin*, 1 Mont. 394; *Berry v. U. S.* 2 Col. T. 186.

¹ *Infra*, § 668.

² See *infra*, § 654.

³ *R. v. Wild*, 1 Mood. C. C. 452; *R. v. Kerr*, 8 C. & P. 179.

⁴ *R. v. Reeve*, L. R. 1 C. C. 362; S. C., 12 Cox C. C. 179; 1 Green C. R. 398. See also *Cady v. State*, 44 Miss. 333. In *Com. v. Sego*, 125 Mass. 210, an employer after the arrest of his clerk, nineteen years old, for larceny of the employer's goods, said to the clerk when out on bail, "I am satisfied that there are other receivers

whom we have not yet discovered. I should like to have you make a clean breast of this matter." This was held not to exclude a confession which followed.

⁵ *People v. Johnson*, 2 Wheel. C. C. 361.

⁶ *R. v. Shepherd*, 7 C. & P. 579.

⁷ *R. v. Thornton*, 1 Mood. C. C. 27; *R. v. Gibney*, Jebb, C. C. 15; *R. v. Kerr*, 8 C. & P. 176; *R. v. Johnston*, 15 Ir. Law R. N. S. 60; *Com. v. Holt*, 121 Mass. 61; *Harding v. State*, 54 Ind. 359; *Wolf v. Com.* 30 Grat. 833; *State v. McLaughlin*, 44 Iowa, 82; *King v. State*, 40 Ala. 314; *Davis v. State*, 2 Tex. Ap. 588. "The case of *R. v. Devlin*, 2 Crawf. & D.

§ 648. A confession, though made under the representation of the infamy or folly of a concealment, if without threats or promises, may be received.¹ Yet this should be carefully guarded, since if such statements take the shape of a threat, they operate to exclude.

Nor does a statement of the wrongfulness of concealing.

§ 649. As has just been incidentally seen, confessions made to constables or other arresting parties, or to magistrates, cannot be excluded, unless it appear that there was a threat of harm or a promise of worldly advantage employed by an authoritative person.² Who is such an authoritative person will be hereafter considered.³

Nor does the bare fact that the confession is made to a person in authority.

§ 650. It is, however, a settled rule that a confession induced by promises by persons in authority is inadmissible.⁴ Thus, a confession obtained by an official promise to put an end to a prosecution will not be received,⁵ though it has been said that the confessions of a person charged with stealing may be proved, even if made after the owner of the goods stolen had promised not to prosecute, where it does not appear that the confession and the promise were directly connected, and the owner not being a person in authority.⁶

Confession induced by authoritative promises is inadmissible.

C. C. 152, is *contra*, but seems not to be law." Taylor's Ev. § 804.

¹ Com. v. Mitchell, 117 Mass. 431; State v. Crank, 2 Bailey, 66; Hawkins v. State, 7 Mo. 190; Fouts v. State, 8 Oh. St. 98; but see People v. Ward, 15 Wend. 231; Oakley v. Schoonmaker, 15 Wend. 226; Cady v. State, 44 Miss. 333. *Infra*, § 654.

² R. v. Baldry, 12 Eng. L. & Eq. 591; 5 Cox C. C. 523; 2 Den. C. C. 430; Com. v. Sturtivant, 117 Mass. 122; Com. v. Smith, 119 Mass. 305; Murphy v. People, 63 N. Y. 590; Wolf v. Com. 30 Grat. 833; Aaron v. State, 37 Ala. 106; State v. Carlisle, 57 Mo. 102; State v. Staley, 14 Minn. 105; State v. McLaughlin, 44 Iowa, 83; State v. Ingram, 16 Kans. 14.

³ *Infra*, §§ 650, 651, 672, 673.

⁴ Cases cited *infra*, §§ 673-4; State

v. Walker, 34 Vt. 396; Com. v. McCann, 97 Mass. 580; Vaughan v. Com. 17 Grat. 576; Deathridge v. State, 1 Sneed, 75; Newman v. State, 49 Ala. 9; Ward v. State, 50 Ala. 135; State v. Lowhorne, 66 N. Car. 639; Austine v. People, 51 Ill. 236; Rutherford v. Com. 2 Metc. (Ky.) 387; People v. Barrie, 49 Cal. 342.

⁵ Smith v. Com. 10 Grat. 734; Boyd v. State, 2 Humph. 39.

⁶ Ward v. People, 3 Hill (N. Y.), 395. See, however, R. v. Jones, R. & R. 152.

A confession by the party arrested to the officer having him in custody, made the day after the party had been told by the officer that "he could make him no promises, but if he made any disclosure that would be of benefit to the government, the of-

§ 651. In the earlier English cases, the tendency was to exclude confessions induced by promises, irrespective of the condition of the person promising. Thus, confessions have been held inadmissible when they were obtained by saying on part of prosecutors, "Tell me where the things are, and I will be favorable to you;"¹ or, "You had better say where you got the property;"² or, "It would have been better for you if you had told at first;"³ or, "You had better tell all you know;"⁴ or, "I should be obliged to you if you would tell all you know; if you will not, of course we can do nothing."⁵ And it has been generally held that any advice to a prisoner by a person in authority, telling him it would be better for him if he confesses, vitiates a confession induced by it.⁶ Lately, however, this has been greatly qualified, and it is now held that there must be a positive promise made or sanctioned by a person in authority to justify the exclusion of the confession.⁷ It has been doubted whether the principle extends to any other cases; and it has been held that a promise made by an indifferent person, who interfered officiously without any kind of authority, and promised, without the means of

ficer would use his influence to have it go in his favor," was held inadmissible; although the officer testified that he thought the statement was voluntary, and would have been made if the inducements the day before had not been held out. *Com. v. Taylor*, 5 Cush. 605.

¹ *R. v. Cass*, 1 Leach, 293, n.; *Boyd v. State*, 2 Humph. 39.

² *R. v. Dunn*, 4 C. & P. 543.

³ *R. v. Walkley*, 6 C. & P. 175.

⁴ *R. v. Kingston*, 4 C. & P. 387.

⁵ *R. v. Partridge*, 7 C. & P. 551. But see *Com. v. Sego*, 125 Mass. 210.

⁶ 2 East P. C. 659; *R. v. Drew*, 8 C. & P. 140; *R. v. Richards*, 5 C. & P. 318; *R. v. Thomas*, 6 C. & P. 353; *R. v. Jones*, R. & R. 152; *R. v. Parratt*, 4 C. & P. 570; *R. v. Garner*, 2 C. & K. 920; 1 Den. 329; *State v. York*, 37 N. H. 175; *Vaughan v. Com.* 17 Grat. 576; though see *Hawkins v.*

State, 7 Mo. 190; and see *infra*, §§ 672-4.

⁷ *R. v. Row*, R. & R. 153; *R. v. Gibbon*, 1 C. & P. 97; *R. v. Hardwick*, 1 C. & P. 98, in note; *R. v. Tyler*, 1 C. & P. 129; *R. v. Green*, 6 C. & P. 655; *R. v. Baldry*, 12 Eng. L. & Eq. 591; 5 Cox C. C. 523; 2 Den. C. C. 430; *R. v. Berigan*, 1 Irish Cir. R. 177 (Cork Lent Assizes, 1841); *R. v. Parker*, 8 Cox C. C. 465; *R. v. Hall*, 12 Cox C. C. 159; *Com. v. Tuckerman*, 10 Gray, 173; *Young v. Com.* 8 Bush, 366; *State v. Kirby*, 1 Strobb. 155; *Wilson v. State*, 3 Heisk. 232; *contra*, *R. v. Drew*, 8 C. & P. 140. Compare *R. v. Parratt*, 4 C. & P. 570, per Alderson, B., which was a confession by a sailor to his captain, who threatened him with prison on a charge of stealing his watch. *R. v. Thompson*, 1 Leach, 291; *R. v. Fleming*, 1 Arm., M. & O. 330.

performance, cannot be deemed sufficient to produce any effect even on the weakest mind, as an inducement to confess; and accordingly confessions, made under such circumstances, to unauthoritative persons, have been admitted in evidence.¹ In such cases the question is simply whether the influences applied were likely to produce untruth. As a person in authority, however, is to be reckoned a prosecutor, when exercising the power of instituting or withholding a prosecution.² But even in such case there must be a promise or threat.³

§ 652. An apparent exception, however, is recognized when the confession is made to a master, who holds out threats or promises, when the offence directly concerns himself, which threats or promises are such as are likely to lead the defendant to confess falsely, either from a feeling of dependent prostration, or from the expectation of lighter penalties if the confession be made.⁴ But where the inducement is not such as is likely to produce falsity, the confession is admissible.⁵ Thus, where the prisoner was indicted for infanticide, and her mistress told her “she had better speak the truth,” the confession was received.⁶

Promise made by master does not exclude when offence does not concern master.

¹ *R. v. Hardwick*, 6 Petersd. Ab. 84, per Wood, B.; *R. v. Taylor*, 8 C. & P. 734; *R. v. Sleeman*, P. & D. 249; 6 Cox C. C. 245. Compare *R. v. Gibbons*, 1 C. & P. 97; *R. v. Tyler*, 1 C. & P. 129; *R. v. Lingate*, 6 Petersd. Ab. 84; *R. v. Spencer*, 7 C. & P. 776; 2 Lew. C. Cas. 125; *R. v. Reason*, 12 Cox C. C. 228; *R. v. Jones*, 12 Cox C. C. 241; *State v. Simon*, 50 Mo. 370.

“Where there were three prisoners in custody on the same charge, and one said to another, ‘Well, John, you had better tell Mr. Walker (the prosecutor) the truth,’ and the prisoner addressed thereupon made a confession; evidence of this confession was received, and its admissibility reserved for the consideration of the Court of Criminal Appeal; that court affirmed the conviction. No counsel appeared, and no reasons were given; but probably it was thought that though what

is said in the presence of a person in authority may generally be considered as said with his sanction, yet that this did not apply to what was said by one prisoner to another; as it could hardly be imagined that what was thus said was sanctioned by the person in authority. *R. v. Parker*, 9 W. R. 699.” Roscoe’s Cr. Ev. 44.

² *R. v. Ruce*, 34 L. T. (N. S.) 400; *Deathridge v. State*, 1 Sneed, 75. *Infra*, § 656.

³ *Com. v. Sego*, 125 Mass. 210; cited *supra*, § 647.

⁴ *R. v. Garner*, 2 C. & K. 920. See Joy on Confessions, 23. In New York, it has been held that a promise made by the owner of stolen goods not to prosecute does not exclude. *Ward v. People*, 3 Hill (N. Y.), 395.

⁵ *Com. v. Sego*, 125 Mass. 210.

⁶ *R. v. Moore*, 2 Den. C. C. 522; 5 C. & K. 153; 12 Eng. L. & Eq. 583;

§ 653. It should be remembered that the age, experience, intelligence, and constitution, both physical and mental, of prisoners, are so various, and the power of performance so different in the different persons promising, that any rule will necessarily sometimes fail of meeting

Condition
of party
confessing
to be con-
sidered.

5 Cox C. C. 554; 34 L. T. (N. S.) 400, cited *infra*, § 677.

"The cases," said Parke, B., "have gone quite far enough, and ought not to be extended. It is admitted that the confessions ought to be excluded unless voluntary, and the judge, not the jury, ought to determine whether they are so. One element in the consideration of the question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the judge was to decide whether the confession was voluntary), that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out, together; not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. The authorities are collected in Mr. Joy's very able treatise on Confessions and Challenges, p. 23. But, in referring to the cases where the master and mistress have been held to be persons in

authority, it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. In *R. v. Upchurch*, Ry. & M. 865, the offence was arson of the dwelling-house, in the management of which the mistress took a part. *R. v. Taylor*, 8 C. & P. 733, is to the like effect. So *R. v. Carrington*, *Ibid.* 109, and *R. v. Hewett*, C. & M. 534. So where the threat was used by the master of a ship to one of the crew, and the offence committed on board the ship by one of the crew towards another; and in that case also the master of the ship threatened to apprehend him; and, the offence being a felony, and a felony actually committed, would have a power to do so on reasonable suspicion that the prisoner was guilty. *R. v. Parratt*, 4 C. & P. 570. In *R. v. Warringham*, tried before me at the Surrey Spring Assizes, 1851, the confession was in consequence of what was said by the mistress of the prisoner, she being in the habit of managing the shop, and the offence being larceny from the shop. This appears from my notes. In the present case the offence of the prisoner, in killing her child, or concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence. In practice, the prosecution is always the result of the coroner's inquest. Therefore, we are clearly of opinion that her confession was prop-

the needs of a case. The test is whether the accused was likely to view the promise as authoritative. And this test is to be determined by the standard of the person confessing.¹

§ 654. A confession is not incompetent because made under advice that if the party was guilty the confession could not put him in any worse condition, and that he

Mere advice does not exclude.

erly received." See also remarks of Shaw, C. J., *Com. v. Morey*, 1 Gray, 462; and see *Com. v. Taylor*, 5 Cush. 608; *Spears v. State*, 2 Oh. St. 583.

"In *R. v. Upchurch*, 1 Moo. C. C. 465, the prisoner, a servant girl, aged thirteen, was indicted for attempting to set fire to her master's house. After the attempt was discovered, her mistress said to her, 'Mary, my girl, if you are guilty do confess; it will perhaps save your neck; you will have to go to prison; if W. H. C. (a person whom the prisoner had charged) is found clear, the guilt will fall on you.' She made no answer. 'Pray tell me if you did it.' The prisoner then confessed. The evidence was admitted, and the point reserved; but the judges thought that it ought not to have been received. In *R. v. Hearn*, 1 C. & M. 109, a servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two bedrooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said nothing to her respecting the fire. Coltman, J., held that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction. Where the prisoner's master, in the presence of two policemen, said, 'I think it is right I should tell you, that besides being in the presence of my brother and my-

self, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue;' it was held that these words did not make the evidence inadmissible. Kelly, C. B., said, 'The words that have been used import advice only on moral grounds.' *R. v. Jarvis*, L. R. 1 C. C. R. 96." Roscoe's Cr. Ev. 8th ed. 42.

In another case, a daughter of the prosecutor (the prisoner's master), but who did not live with her father, and was not the prisoner's mistress, whilst she had temporary charge of the prisoner, who had been previously taken into custody, said to her, "I am sorry for you; you ought to have known better. Tell me the truth, whether you did it or no. Do not run your soul into more sin, but tell the truth;" when the prisoner made a full confession. It was held, that the confession was not made to a person in authority, and was therefore admissible. *R. v. Sleeman*, Dears. C. C. 249; 6 Cox C. C. 245. See also *R. v. Luckhurst*, 1 Dears. C. C. 245.

A person to whom a negro is bound as an apprentice, though a justice of the peace, if not acting as such, and in no way affected by the offence, is not, it has been held in Virginia, a person in authority in the sense of the above rule. *Smith v. Com.* 10 Grat. 734.

¹ See *Com. v. Smith*, 119 Mass. 305; *Earp v. State*, 55 Ga. 136.

had better tell the truth at all times.¹ Admonitions to tell the truth do not exclude, though coupled with statements that to tell the truth is best. It is otherwise only when the party is led to believe that he will be bettered by saying a particular thing.²

§ 655. Difficult questions may arise where there is reason to believe that the confession was made with the hope of compromise, or of obtaining a lighter sentence. To exclude such confessions arbitrarily would exclude almost all confessions. To work an exclusion there must be shown a causal connection between an authoritative promise and the confession. If this be not shown, the confession is admissible. Thus a statement by a jailer, after the arrest of a prisoner, "that if the Commonwealth should use any of them as witnesses, he supposed it would prefer her to either of the others" who were arrested and charged with the same offence, is not sufficient to exclude a voluntary confession made by her, on the same day, to a magistrate, after the magistrate had told her such confession might be used as evidence against her;³ but a confession of guilt, made with a view to compromise the matter with the injured party, on the condition that the accused shall not be prosecuted, is inadmissible against the accused.⁴ And *a fortiori* is an offer to compromise inadmissible.⁵

§ 656. It may be justly argued that the State, by calling an accomplice as a witness against his associates, is precluded from subsequently using his admissions on the witness stand to procure his conviction in a prosecution instituted against himself.⁶ Where, however, the ac-

¹ Supra, § 647; infra, § 674; Fouts v. State, 8 Oh. St. 98; Young v. Com. 8 Bush, 366; Stafford v. State, 55 Ga. 592; State v. Whitefield, 75 N. C. 356; State v. Crank, 2 Bailey, 66; Hawkins v. State, 7 Mo. 190; State v. Hagan, 54 Mo. 192.

² Supra, § 647; infra, § 674.

³ Fife v. Com. 29 Penn. St. 429. See Com. v. Tuckerman, 10 Gray, 173.

⁴ R. v. Ruce, cited supra, § 652; R. v. Jones, R. & R. 152; Austine v. People, 51 Ill. 236. See Ward v. People, 3 Hill (N. Y.), 395.

⁵ State v. Emerson, 48 Iowa, 172. See, for a discussion of this question in its civil bearings, Whart. on Ev. § 1090.

⁶ U. S. v. Lee, 4 McLean, 1103. See, however, Com. v. Woodside, 105 Mass. 594; Dabney's case, 1 Robinson, 696.

In Scotland this is conceded. "It has been long an established principle of our law," says Mr. Alison, "that by the very act of calling the *socius* and putting him in the box, the prosecutor debars himself from all title to molest

complice shirks or prevaricates in rendering his testimony, then this protection cannot be claimed.¹

dence cannot be used.

him for the future, with relation to the matter libelled. This is always explained to the witness by the presiding judge as soon as he appears in court, and consequently he gives his testimony under a feeling of absolute security, as to the effect which it may have upon himself. If, therefore, on any future occasion, the witness should be subjected to a prosecution, on account of any of the matters contained in the libel on which he was examined, the proceedings would be at once quashed by the Supreme Court. This privilege is absolute, and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice, indeed, may often be defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the box; but it would be much more put in hazard, if the witness was sensible that his future safety depended on the extent to which he spoke out against his associates at the bar. The only remedy, therefore, in such a case, is committal of the witness for contempt or prevarication, or indicting him for perjury, if there are sufficient grounds for any of those proceedings." *Alison's Prac. Cr. Law of Scotl.* 453.

¹ Where an accomplice had a promise from the attorney general that he should not be prosecuted if he became state's evidence, and made a full disclosure, and upon such promise he made a confession, but refused afterwards to testify, it was held that he might be put on his trial, and the confession given in evidence against him. *Com. v. Knapp*, 10 Pick. 478.

"Where, in a case of burglary, an accomplice who had been allowed to go before the grand jury as a witness

for the crown, upon the trial pretended to be ignorant of the facts on which he had before given evidence, *Coleridge, J.*, ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. *R. v. Moore*, 2 Lew. C. C. 37. So where an accomplice, after making a full disclosure before the committing magistrate, refused, when before the grand jury, to give any evidence at all, *Wightman, J.*, ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *R. v. Holtham*, Staff. Spr. Ass. 1843, 2 Russ. by Greav. 958. So where an accomplice, who was called as a witness against several prisoners, gave evidence which showed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty, *Parke, B.*, thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. *R. v. Hokes*, Staff. Spr. Ass. 1837, 2 Russ. by Greav. 958 (d). The prisoner made a statement to a constable, and then repeated it to a magistrate upon oath. He then made a further statement on oath, adding, "I came here to save myself." Subsequently, he refused to prosecute. It was held by five judges out of nine that both the statements made by him were receivable in evidence against him; and by seven out of nine that the first statement was admissible. *R. v. Gillis*, 11 Cox C. C. R. (Irish) 69." *Roscoe's Cr. Ev.* 8th ed. 133.

§ 657. A confession, though made under the influence of some collateral benefit or boon, no hope or fear being held out in respect to the particular criminal charge, may be received ;¹ and so where a promise of an employer is not to discharge the defendant if he will "settle" for things stolen, on which defendant confesses.²

Collateral
induce-
ment does
not ex-
clude.

In an Alabama case, the evidence was that the owner of lost property, not suspecting the defendant, offered him a reward if he would secure the property and the thief. The defendant brought back the property, and on being asked for the thief, said that he was the thief, and claimed the reward. It was held that his admission could be put in evidence against him.³

§ 658. The question, it is now settled,⁴ is whether the inducement held out to the prisoner was calculated to make his confession untrue ; if not, it will be admissible.⁵ Thus in 1872, it was held in England that the words, "I must know more about it," addressed by a police constable to a prisoner in the course of a conversation about the offence, just after arrest, are not sufficient to exclude a confession.⁶ In this case Keating, J., after consulting with Quain, J., said : "In my time it used to be held that a mere caution given by a person in authority would exclude an admission, but since then there has been a return to doctrines more in accordance with the common sense view. *The real question is, whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from the fear of the threat, or hope of profit from the promise.*"⁷ And

Issue is,
whether
the influ-
ence ap-
plied was
such as to
induce a
false state-
ment.

As to accomplices as witnesses see *supra*, §§ 439-444.

As to admissions of accomplices made during the continuance of the confederacy see *infra*, § 698.

¹ *State v. Wentworth*, 37 N. H. 196.

² *Com. v. Howe*, 2 Allen, 153.

³ *McIntosh v. State*, 52 Ala. 355.

⁴ Archb. C. P. 9th ed. 110; *R. v. Jarvis*, L. R. 1 C. C. 96; *State v. Grant*, 22 Me. 171.

⁵ 2 Russ. on Cr. 845; *R. v. Thomas*, 7 C. & P. 345. See *U. S. v. Nott*, 1

McLean, 499; *U. S. v. Graff*, 14 Blatch. 381; *State v. Grant*, 22 Me. 171; *Com. v. Morey*, 5 Cush. 461; *Com. v. Smith*, 119 Mass. 305; *O'Brien v. People*, 48 Barb. 274; *People v. Phillips*, 42 N. Y. 200; *Fife v. Com.* 29 Penn. St. 420. See, to same general effect, *Fouts v. State*, 8 Oh. St. 98; *State v. Kirby*, 1 Strobhart, 155.

⁶ *R. v. Reason*, 12 Cox C. C. 228.

⁷ To the same effect is *R. v. Dingley*, 1 C. & K. 637; *R. v. Jones*, 12 Cox C. C. 241 (1871), before the Court of Criminal Appeal, and *State v. Si-*

where a prisoner was taken before a magistrate on a charge of forgery, and the prosecutor said, in the hearing of the prisoner, that he considered him as the tool of G., and the magistrate then told the prisoner to be sure to tell the truth, and upon this the prisoner made a statement, this was held receivable.¹ The same conclusion was reached where the confession was the result of friendly advice, though the person advising was a stockholder in a corporation defrauded by the defendant.²

§ 659. Assurances that the confession would not be disclosed, if not made by a person in authority in such a way as to lead to a false statement, do not exclude a confession they induced, such assurances being likely rather to elicit than to suppress truth;³ and on the same reasoning, where the defendant confessed his guilt to a fellow-prisoner on being assured by the latter that one criminal cannot testify against another, it was held that the confession was admissible.⁴

§ 660. The inducement must refer to a temporal benefit, for hopes which are referable only to a future state are not within the principle which excludes confes-

Assurances
of secrecy
do not ex-
clude.

Nor do
spiritual
induce-
ments.

mon, 50 Mo. 370; *State v. Vaigneur*, 5 Rich. 391; *Merritt v. State*, 59 Ala. 47; *State v. Wilson*, 8 Heisk. 282; *Rice v. State*, 47 Ala. 38; *Levy v. State*, 49 Ala. 390.

¹ *R. v. Court*, 7 C. & P. 486; *R. v. Thomas*, 7 C. & P. 345.

A person under arrest for stealing was visited in jail by the prosecutor, who said to him that if he wished for any conversation, he could have a chance; the prisoner made no reply for a minute or two; the prosecutor then told the prisoner he thought it was better for all concerned, in all cases for the guilty party, to confess; the prisoner then said he supposed he should have to stay there whether he confessed or not; the prosecutor replied that he supposed he would, and in his opinion it would make no difference as to legal proceedings, and that it was considered honorable in all cases, if a person was guilty, to con-

fess. It was held that the confessions of the prisoner, made immediately after this conversation, were admissible in evidence against him. *Com. v. Morey*, 1 Gray, 461. And see, to same effect, *State v. Freeman*, 12 Ind. 100.

² *Com. v. Tuckerman*, 10 Gray, 172. See also *Com. v. Whittemore*, 11 Gray, 201.

Where a prisoner, when arrested, was told by the officer that he was not obliged to answer any questions, but a few days later he was questioned by the officer, and made statements prejudicial to himself, it was held that no inducement or influence on the part of the officer being shown, the statements were admissible in evidence, although the prisoner had no counsel at the time he made them. *Com. v. Sturtivant*, 117 Mass. 122.

³ *R. v. Thomas*, 7 C. & P. 345; *Com. v. Knapp*, 9 Pick. 496.

⁴ *State v. Mitchell*, Phill. (N.C.) 447.

sions obtained by improper influence.¹ Hence the fact that the confession was made in response to spiritual exhortations, even by a clergyman or priest, does not exclude them.²

§ 661. When a party is compelled by duress to make a self-disserving statement, this statement cannot be put in evidence against him.³ Legal imprisonment, however, does not operate to exclude a confession made during its continuance when no threats or promises are used.⁴ Thus where a prisoner after his arrest, upon being interrogated why he had killed his wife, replied, "Because I loved her;" and said further, "I killed her because she loved another better than me;" and also said to a fellow-prisoner in jail, that he had killed her, but if it was to do again he would not do it; it was held that there was nothing in the circumstances under which these confessions were made to render them inadmissible.⁵ But it is otherwise when the confession is brought out by compulsion.⁶

§ 662. A confession is admissible when voluntarily made to a public officer, even though the prisoner be in custody of such officer, unless the confession be in answer to questions involving threats or promises.⁷

¹ *R. v. Gilham*, 1 Mood. C. C. 186; *Com. v. Drake*, 15 Mass. 161; *State v. Bostick*, 4 Harring. 564; though see *R. v. Griffin*, 6 Cox C. C. 219.

² *R. v. Dingley*, supra; *R. v. Gilham*, supra, as explained in *Joy on Conf.* 186. See, however, *R. v. Griffin*, 6 Cox C. C. 219. As to privilege of priests in respect to confessional see supra, § 507.

³ *Stockflesh v. De Tastet*, 4 Camp. 11; *Robson v. Alexander*, 1 M. & P. 448; *Tilley v. Damon*, 11 Cush. 247; *Foss v. Hildreth*, 10 Allen, 76. As to torture see supra, § 646.

⁴ *Com. v. Cuffee*, 108 Mass. 285; *People v. Rogers*, 18 N. Y. 9; *Hartung v. People*, 4 Park. C. R. 324; *People v. Balbo*, 19 Hun, 424; aff. Ct. of App. 1880; *Com. v. Mosler*, 4 Barr, 264; *Stephen v. State*, 11 Ga. 225; *Meinaka v. State*, 55 Ala. 47; *State v. Guy*, 69 Mo. 430; *Austin v.*

State, 14 Ark. 556; and cases cited supra, §§ 647, 649, 656-7.

In *State v. Graham*, 74 N. C. 646, where an officer compelled defendant to put his foot in a track and testified as to the result, it was held that the evidence was competent. But see fully infra, § 796.

⁵ *State v. Freeman*, 1 Speers, 57.

⁶ *State v. Dildy*, 72 N. C. 325. Supra, § 646.

⁷ *R. v. Wild*, 1 Mood. C. C. 452; *R. v. Thornton*, 1 Mood. C. C. 27; *R. v. Gibney*, Jebb C. C. 15; *R. v. Upchurch*, 1 Mood. C. C. 465; *R. v. Johnston*, 15 Ir. L. R. 60; *R. v. Kerr*, 8 C. & P. 179; *R. v. Rees*, 7 C. & P. 569; *R. v. Bartlett*, 7 C. & P. 832; *R. v. Ellis*, R. & M. (N. P.) 432; see qualifications in *R. v. Mick*, 3 F. & F. 822; *R. v. Bodkin*, 9 Cox C. C. 403; *R. v. Devlin*, 2 Craw. & Dix, 152; *People v. Murphy*, 63 N. Y. 590; *Com.*

§ 663. A prisoner's confession will not be rejected as evidence merely because it was made in answer to a question which assumed his guilt.¹ Thus where the officer, who committed the prisoner on a charge of murder, asked "whether, if it was to do over again, he would do it," and the reply was, "Yes sir-ree, Bob ;" it was held that both the question and answer were admissible in evidence, as well as the fact that, in making the reply, the prisoner's "manner was short."²

Even when questions are leading.

§ 664. Nor, as has been seen, will a confession, even under oath, be excluded by the fact that it was elicited by questions in prior judicial proceedings, if no compulsion or undue influence was used, and the party was not at the time under a criminal charge.³ Thus, as we have seen, voluntary admissions of a defendant in arson, given by him in evidence at a fire inquest, and reduced to writing and signed by him, are admissible against him on a trial for arson ;⁴

Not excluded by the fact that the statement was under oath.

v. Harman, 4 Barr, 269; though see *People v. Wentz*, 37 N. Y. 303; *Young v. Com.* 8 Bush, 366.

Admissions by a prisoner, elicited by questions of a police officer, with an admonition to tell all she knew, are inadmissible. But a subsequent statement by the prisoner to another officer is not necessarily so far under the same influence as to exclude it. *R. v. Cheverton*, 2 F. & F. 833 — Erle.

¹ *Thornton's case*, 1 Mood. C. C. 28; *Gibney's case*, Jebb C. C. 15; *Phil. on Ev.* 427.

A person being in custody, and having been charged with setting fire to some bobbins of cotton in a mill, was shown a piece of paper (partially burnt) with writing on it, which had been found among the burnt property. Without receiving any caution whatever, he was then asked by the policeman whose writing it was, and what he had done with the remainder of it. It was held, that what he said in answer to the questions was receivable, as the question did not amount to a

threat. *R. v. Regan*, 17 L. T. (N. S.) 325 — Shee.

A policeman asked a prisoner, who was suspected of having made away with her illegitimate child, to tell him where it was. She refused to do so, upon which he said that if she did not tell she might get herself into trouble, and it would be the worse for her. Then she made a statement. It was held that the statement was inadmissible. *R. v. Coley*, 10 Cox C. C. 536 — Mellor.

² *Carroll v. State*, 23 Ala. 28.

³ *R. v. Ellis*, R. & M. (N. P.) 432; *R. v. Thornton*, 1 Mood. C. C. 27; *R. v. Garbett*, 1 Den. C. C. 236; 2 Cox C. C. 448; *R. v. Wheeler*, 2 Mood. C. C. 45; *R. v. Goldshede*, 1 C. & K. 657; *R. v. Tubby*, 5 C. & P. 530; *Com. v. King*, 8 Gray, 501; *Com. v. Reynolds*, 122 Mass. 454; *Hendrickson v. People*, 6 Selden, 13; *Teachout v. People*, 41 N. Y. 7; *Anderson v. State*, 26 Ind. 89; *Alston v. State*, 41 Tex. 39; *contra*, *Josephine v. State*, 39 Miss. 615.

⁴ *Com. v. Bradford*, 126 Mass. 42.

and so of a schedule of a bankrupt's assets, filed by him in bankruptcy proceedings.¹ Declarations, also, of the defendant, though made as a witness before a committee of the House of Commons, and under compulsory process, were holden by Abbott, C. J.,² to be afterwards admissible against him, upon an indictment for corruptly granting licenses to public houses.³ So a statement made voluntarily under oath by a witness before a coroner's inquest in answer to interrogatories there put to him, although he was at the time informed he was suspected of the crime, has been held subsequently admissible when he was on trial for the homicide.⁴

¹ Abbott v. People, 75 N. Y. 602. See infra, § 665.

² R. v. Mercer, 2 Stark. 366.

³ And so as to sworn admissions before a commissioner in bankruptcy, though the defendant was at the time under criminal charge. R. v. Wheat-er, 2 Mood. C. C. 45; R. v. Sloggett, P. & D. 656; 7 Cox, 139.

A compulsory examination, however, of a bankrupt under oath, has been held inadmissible, under the U. S. statute, in a criminal proceeding. U. S. v. Prescott, 2 Dill. 405.

"There is much contradiction in the older cases on the point whether confessions made in the course of legal proceedings, not having reference to the charge upon the prosecution of which they are sought to be used, are admissible. But the subject was fully considered in R. v. Scott, 25 L. J. M. C. 128; 7 Cox C. C. 164; and the distinction pointed out. That was a case in which the prisoner had been examined in the Court of Bankruptcy touching his trade, dealings, and estate, under the provisions of the 12 & 13 Vict. c. 106, s. 117 (repealed); and this examination was given in evidence on a criminal charge against the bankrupt of mutilating his trade books. The question whether such evidence was admissible was argued before the Court of Criminal Appeal, and it was admitted on all hands that,

in ordinary cases, what is stated by a person in a lawful examination may be used in evidence against him. The main contention was, that inasmuch as by the act it was compulsory upon the bankrupt to answer the questions put to him, whether they tended to criminate him or no, he ought not to be criminally prejudiced by such answers, otherwise the fundamental maxim, '*Nemo tenetur seipsum accusare*,' would be violated. In this view Coleridge, J., concurred; but all the other judges, Lord Campbell, C. J., Willes, J., Alderson and Bramwell, BB., thought the evidence was admissible, and that the maxim relied on had been overruled by the legislature. And the same view of the law has been recently taken with respect to the Bankruptcy Act, 1869. See R. v. Hillam, 12 Cox C. C. 174; R. v. Widdup, 42 L. J. M. C. 9. Now, where it is made compulsory to answer questions under all circumstances, it is usual for the legislature to insert a clause declaring that the evidence so given shall not be made use of in any criminal proceedings." Roscoe's Cr. Ev. 50.

⁴ Teachout v. People, 41 N. Y. 7. See, to same general effect, R. v. Harworth, 4 C. & P. 254; R. v. Tubby, 5 C. & P. 530; R. v. Braynell, 4 Cox C. C. 402; State v. Gilman, 51 Me. 206; People v. Hendrickson, 1 Parker

And where a defendant, being mistaken for a witness, was partially examined upon oath, this was held not to vitiate a confession subsequently made by him after due caution from the magistrate.¹ It is ruled, however, that when a party under charge of committing a particular crime is called by the prosecution and compelled to answer under oath as to such crime, on the trial of another party, his testimony is regarded as given under compulsion, and cannot afterwards be introduced against him when he is on trial; and the same privilege is applied to all cases in which he is forced to answer under oath when charged with the crime as to which his confession is sought to be used against him.² And, as we will presently see, when the defendant is in custody under charge of crime, and is then sworn and questioned by the examining magistrate, his answers thus compelled cannot afterwards be put in evidence against him.³

C. R. 409; *People v. Banker*, 2 Parker C. R. 26; *People v. McMahon*, 2 Parker C. R. 663; *Snyder v. State*, 59 Ind. 105; *State v. Broughton*, 7 Ired. 96; *State v. Vaigneur*, 5 Rich. 391; *Shoeffler v. State*, 3 Wis. 820; *Dickerson v. State*, S. C. Wis. 1880, though see *R. v. Lewis*, 6 C. & P. 161; *R. v. Davis*, *Ibid.* 177; *R. v. Owen*, 9 C. & P. 238, where the prisoner was examined in his own case. The testimony, however, must be voluntary. *People v. Soto*, 49 Cal. 69.

¹ *R. v. Webb*, 4 C. & P. 564.

² *Jackson v. State*, 56 Miss. 311, citing *People v. McMahon*, 15 N. Y. 384; 1 Arch. Cr. Pl. & Pr. (Pomeroy's ed.) 386. *Infra*, § 668.

³ *Infra*, § 668; *Com. v. Harman*, 4 Barr, 269.

Mr. Taylor (Ev. § 821) on this topic says: "On the trial of an indictment for conspiracy, the answers in chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, have been received. *R. v. Scott*, 25 L. J. M. C. 128, cited *infra*, § 665; *R. v. Goldshede*, 1 C. & K. 657, per *Ld. Den-*

man; *R. v. Highfield*, per Vaughan, B., cited 2 Russ. on Cr. 859. See also *R. v. Sloggett*, P. & D. 656; 7 Cox, 139, S. C. An affidavit, too, has been given in evidence against a prisoner, which was sworn by him in a suit in Doctors' Commons (*R. v. Walker*, per *Ld. Ellenborough*, cited by Gurney, B., in 6 C. & P. 162, 664); and depositions made by prisoners, when examined as witnesses against other persons on criminal charges, have several times been admitted against themselves. *R. v. Haworth*, 4 C. & P. 254, per Parke, J.; *R. v. Tubby*, 5 C. & P. 530, per Vaughan, B.; *R. v. Braynell*, 4 Cox C. C. 402. Nay, in one case, the very point decided by Mr. Baron Gurney was distinctly overruled by Chief Justice Cockburn; and a deposition was admitted against a prisoner, who had made it before the justices while under examination as a witness, and who, in consequence of its self-criminating character, had been committed to take his trial. *R. v. Chidley*, 8 Cox C. C. 365. See also *R. v. Colmer*, 9 Cox C. C. 506, per Martin, B.

§ 665. The privilege extends to all cases where the defendant can prove that the answers offered in evidence were given by him when examined as a witness in another suit, in which he claimed the protection of the court, and had still been illegally compelled to answer.¹ Excluded when answers are compelled against witness's consent. "Testimony so obtained is excluded, not, as it seems, because it may possibly be untrue, but because the right of the witness to be silent has been infringed; and it is deemed expedient, on grounds of public policy, to uphold the broad legal maxim, that no man shall be forced to criminate himself."² But if the witness is wrongfully compelled to answer, and he does answer, that does not render his evidence illegal as respects other parties. It is the witness's own affair, and another party cannot complain of it.³

So, upon a trial for manslaughter, the prisoner's deposition on oath, taken by the coroner upon the inquest, has been admitted in evidence against him. *R. v. Bateman*, 4 F. & F. 1068, per Martin, B., and Willes, J. So the testimony, given by a prisoner before a committee of the House of Commons, has been read against him on a criminal trial (*R. v. Merceron*, 2 Stark. 366, per Abbott, J.); though this case is of little authority on the subject under discussion, as the evidence could not then have been given on oath. See per *Ld. Tenterden*, in *R. v. Gilham*, 1 Mood. C. C. 203. The case of *R. v. Britton* (1 M. & Rob. 297, per Patteson and Alderson, JJ.), which is sometimes cited as a decision conflicting with the above proposition, is in fact no hostile authority, as the only question there determined was, that on an indictment against a bankrupt for not disclosing his effects under the commission, his balance-sheet, which was only admissible in the event of the commission being valid, could not be given in evidence to prove the petitioning creditor's debt as a part of the commission. Per *Patterson, J.*, in *R. v. Wheeler*, 2 Mood. C. C. 51.

On the whole, it seems clear that if a prisoner, on being examined as a witness, has consented to answer questions to which he might have demurred as tending to criminate himself, and which, therefore, he was not bound to answer, his statement will be deemed voluntary, and, as such, may be subsequently used against himself for all purposes (but see *contra*, *R. v. Gillis*, 17 Ir. L. R. (N. S.) 512; 11 Cox C. C. 69), unless he be protected by the special language of some statute."

¹ *Supra*, §§ 463 *et seq.*; *R. v. Garbett*, 1 Den. C. C. 236; 2 C. & K. 474; *R. v. Coote*, L. R. 4 P. C. 599.

² *Taylor's Ev.* § 822.

³ *R. v. Kinglake*, 11 Cox C. C. 499.

In *R. v. Coote*, 12 Cox C. C. 557; 4 Moore P. C. C. 463, the alleged confession was made in proceedings under an act of the Quebec legislature, in conformity with which certain officers called "fire marshals" are appointed, with power to inquire into the origin of fires in Quebec and Montreal, and for that purpose to examine persons on oath. Upon an inquiry, held in pursuance of this statute, as to the origin of a fire in a warehouse

§ 666. At common law a party accused of a crime cannot be required to answer any questions which may expose him to prosecution. In England, however, in the days of Philip and Mary, a statute was passed authorizing such an examination, under certain conditions; and this statute has been reproduced, with various modifications, in several of the States of the American Union. To give these statutes would transcend the limits of the present work. In England the rule is now defined by 11 & 12 Vict. c. 42, and 14 & 15 Vict. c. 93. By these statutes, which are now noticed because they are of the same character as several American statutes on the same topic, "it would seem that in order to render a prisoner's statement strictly valid as a statutory confession, the following circumstances must all have occurred. The charge must have been read to the accused; ¹ all the witnesses must have been examined in his presence, and the depositions read to him after the examinations were completed; he must then, and not till then, be twice cautioned by the justice: first, generally; ² and, secondly, as to the inefficacy of any promises or threats which may have been formerly held out to him; his whole statement must next be taken down in his own words; ³ it must then be read to him, ⁴ and he must be pressed for his signature, ⁵ though the act is silent as to the effect of his refusing to sign it, or even to admit its correctness; the justice must also sign the statement; ⁶ and this being done, it must be kept with the depositions, and be transmitted together with them and certain other documents to

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occupied by the prisoner, he was examined on oath as a witness. No caution was given to him that his evidence might be used against him. At the time of such examination there was no charge against the prisoner or any other person. Subsequently the prisoner was tried for arson of the said warehouse, and his depositions made at the inquiry before the fire marshals were admitted as evidence against him. It was held by the Privy Council (reversing the judgment of the Court of Queen's Bench for the Province of Quebec, Canada), that the depositions were properly admitted.

¹ Taylor's Ev. § 812.

² See *State v. Rorie*, 74 N. C. 148, where it was held that the prisoner should be cautioned that silence would not be used against him.

³ See *R. v. Roche*, C. & M. 341; *R. v. Sexton*, and *R. v. Mallett*, cited 2 Russ. on Cr. 867.

⁴ See § 18; and 2 Russ. on Cr. 881, 882.

⁵ See 2 Russ. on Cr. 881, 882; *R. v. Lambe*, 2 Leach, 552; *R. v. Thomas*, Ibid. 637; *R. v. Foster*, 1 Lew. C. C. 46; *R. v. Hirst*, Ibid.; *R. v. Telicote*, 2 Stark. 483; *R. v. Pressly*, 6 C. & P. 183.

⁶ See *R. v. Tarrant*, 6 C. & P. 182.

the court where the trial is to be had, on or before the opening of such court."

§ 667. Where the prisoner voluntarily confesses before an examining magistrate, and where it is the duty of the latter to take the examination in writing, when such is done, the writing alone, if producible, is evidence of the confession, and the writing cannot be varied by parol proof.¹ Parol evidence, however, of a confession made during an examination before a magistrate, is admissible, although it was taken down in writing by the magistrate, if from

"Although a written examination, if it purport to be taken in conformity with the act, and to be signed by the committing magistrate, is in strictness admissible without proof, it may still be advisable in serious cases, as a matter of caution, to call either the justice or the clerk, so that it may clearly appear that the proceedings have been conducted in the proper manner. See *R. v. Pikesley*, 9 C. & P. 124; *R. v. Wilshaw*, C. & M. 145. Indeed, this course may become necessary, if the document has not been drawn out in the form given in the schedule, or if it contains erasures or interlineations which require explanation. See *R. v. Brogan*, cited 2 Russ. on Cr. 887; *R. v. Dwyers*, Ibid. n. p. If, too, the prisoner has not signed his name or mark to the paper, some witness, who was present at the inquiry, should, in prudence, be forthcoming to speak to its identity, and to prove that it was read over to the accused, and assented to by him. See *R. v. Reading*, 7 C. & P. 649; *R. v. Hearn*, C. & M. 109; *R. v. Hopes*, 7 C. & P. 136; 1 M. & Rob. 396, n., S. C.; *R. v. Haines*, 2 Russ. on Cr. 886. It would seem to be further necessary to the validity of an examination as evidence *per se*, that it should appear on the face of the document that it was taken while the prisoner was un-

der examination on a charge of felony or misdemeanor, or of suspicion of one of those crimes, and that the justices signing it were acting as justices pursuant to statute. *R. v. Tarrant*, 6 C. & P. 182. Whether these facts must appear by a separate caption is a point which is not yet determined. The form in the schedule gives a separate caption, but that form, though legalized, is not rendered necessary by the act; and under the old law, provided the examination was written on the same paper as the depositions, the heading at the commencement was held to apply to all the statements contained in the document. In this respect the rule agreed with that which governs examinations taken under the Poor Law Acts; for it is not necessary, as was once supposed, that such examinations should have distinct captions, but it will suffice to state in the first caption the names of all the witnesses." Taylor's Ev. § 815.

¹ 1 Leach, 309; Foster, 255; Roscoe's Cr. Ev. 60; *R. v. Walter*, 7 C. & P. 267; *R. v. Morse*, 8 C. & P. 605; *R. v. Bond*, 4 Cox C. C. 231; *State v. Parish*, 1 Busbee, 239; *State v. Irwin*, 1 Hayw. 113; *Cicero v. State*, 54 Ga. 156; *Wright v. State*, 50 Miss. 332. Under Nevada statute see *State v. Rover*, 13 Nev. 17.

informality the written examination is not admissible;¹ and such examination, though informal, may be used to refresh the memory of a witness who was present and took it down.²

Statements collateral to the examination are not excluded by the examination;³ nor does a subsequent examination necessarily exclude a prior oral confession.⁴

¹ *R. v. Bell*, 5 C. & P. 162; *R. v. Fearshire*, 1 Leach C. C. 240; *R. v. Read*, M. & M. 403; *State v. Parish*, Busbee, 239.

² *Telicote's case*, 2 Stark. (N. P.) 483; *Foster's case*, 1 Lew. C. C. 46; *Hirst's case*, 1 Lew. C. C. 46; *Pressly's case*, 6 C. & P. 183; *R. v. Jones*, Carrington Suppl. 13; *R. v. Watkins*, 4 C. & P. 550, n. b; *R. v. Thomas*, 2 Leach C. C. 637; *R. v. Jacobs*, 1 Leach C. C. 310; *R. v. Fisher*, 1 Leach C. C. 310, 311.

³ *R. v. Ball*, 5 C. & P. 267; *R. v. Spilsbury*, 7 C. & P. 788; *Rowland v. Ashbury*, Ry. & M. 221; *Leach v. Simpson*, 4 M. & W. 312; *Harris's case*, 1 Mood. C. C. 338.

⁴ *R. v. Carty*, McNally's Ev. p. 45.

“ Thus where one of two prisoners was committed before the other was apprehended, and the depositions against that prisoner were read over before the magistrate to the other prisoner, and after they were read the prisoner went across the room to witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoner before himself, and that the statement to the witness was not contained in it; Park, J., held, that what the prisoner had said to the witness might be given in evidence. *R. v. Johnson*, Glouc. Spr. Ass. 1829, 2 Russ. on Crimes, by Greaves, 4th ed. 453. So where a man and woman were brought before the magistrate

on a charge of burglary, and, in the course of the examination of a witness, a glove was produced, which had been found on the man with part of the stolen property in it; on which the man said, ‘ She gave me the glove, but she knew nothing of the robbery;’ the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statements in the depositions or the examination of the prisoner, Erskine, J., held that what the man said might be proved by parol evidence. *R. v. Hooper*, Glouc. Sum. Ass. 1842, Ibid. And it was said by Best, C. J., that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. *Rowland v. Ashby*, Ry. & M. 232. So it has been ruled by Park, J., that an *incidental observation* made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry, so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against the prisoner. *R. v. Moore*, Matthew's Dig. Cr. Law, 157; *R. v. Spilsbury*, 7 C. & P. 187, per Coleridge, J. But where it ought to have been taken down in writing, and it was not, Littledale, J., ruled that it was inadmissible. *R. v. Maloney*, Matthew's Dig. Cr. Law, 157.” Roscoe's Cr. Ev. 8th ed. 59.

In Maine it is held that parol evidence of a confession made in a written examination is admissible.¹

§ 668. But the testimony of an accused party, *taken as such*, is not admissible, when such accused party is put on his oath and sworn, and examined.² This rule is founded upon the unreliable as well as the inquisitorial

¹ State v. Rowe, 61 Me. 171. In this case Barrow, J., said:—

“In some of the cases touching the admissibility of confessions made by prisoners at their examinations before magistrates, the question has been whether any evidence of such confessions, aside from the magistrate’s record, could be allowed. With us the practice has constantly been to admit both the record and oral evidence. To this there seems no objection in principle. What is there said by the prisoner does not constitute a plenary judicial confession, because not made before a court competent to try the case. Hence it is not conclusive upon him, as such a plea in this court would be, unless for cause shown he had leave to withdraw it. But, disregarding his plea before the magistrate, he has the right to plead anew in the court having jurisdiction to determine the cause, and his former confession is simply regarded as evidence for the consideration of the jury.”

² R. v. Lewis, 6 C. & P. 161; R. v. Davis, Ibid. 177; U. S. v. Williams, 1 Clifford, 5; Shoeffler v. State, 3 Wis. 820; People v. Gibbons, 49 Cal. 557; State v. Garvey, 25 La. An. 191.

“One species of irregularity,” says Mr. Taylor (Ev. § 818), “in excluding the examination as evidence *per se*, prevents its being used to refresh the writer’s memory, and shuts out all parol testimony of what was said on the same occasion. The irregularity in question is where the examination

purports to have been taken upon oath. R. v. Smith, 1 Stark. 242, per Le Blanc, J.; R. v. Davis, 6 C. & P. 177, per Gurney, B.; R. v. Bentley, Ibid. 148, per Ibid.; R. v. Rivers, 7 C. & P. 177, per Park, J.; R. v. Owen, 9 C. & P. 238, per Gurney, B.; R. v. Pikesley, Ibid. 124, per Parke, B., and Bosanquet, J.; R. v. Wheeley, 8 C. & P. 250, per Alderson, B. This rule, which is supported by too many authorities to admit of dispute, rests upon two principles of law, both of which are of very questionable policy, as applied to the particular case under discussion. The first is a principle which has been several times mentioned above, namely, that the confession of a prisoner must be voluntary; and it is contended, that a statement made under oath is not so. This is certainly true in one sense, though not in that in which it is used by the advocates for exclusion. A confession not voluntary is excluded. Why? because it may be untrue. A confession made upon oath cannot be rejected on this ground; since it is absurd to contend that an oath, which in all other cases is rightly considered as the most effectual test of truth, should, if taken by a prisoner, be regarded as an inducement to falsehood. But then, it is urged, *Nemo tenetur prodere seipsum*; a prisoner should not be compelled to criminate himself. Admitted; but what then? A prisoner, though sworn, is no more bound to criminate himself than if he were simply interrogated without any oath being administered to him.

character of such statements; and therefore where a man, having been arrested by a constable; without warrant, upon suspicion of having committed murder, was examined as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder.¹ The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate.²

§ 669. But it is otherwise as to voluntary statements. Thus where a magistrate told a prisoner, on examination before him for larceny of a watch, that unless he accounted for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing, and also warned him not to commit himself by his confessions, it was held that the statements of the prisoner on his examination were admissible as a confession on a subsequent trial.³ And the same rule will apply to a defendant's voluntary testimony given under the recent statutes enabling him to be a witness in his own behalf.⁴

As has been seen, the most solemn adjurations do not exclude a confession when there were no threats or promises used.⁵

He has still full liberty to decline to make any explanation or declaration whatever: though if he does consent to answer the questions put to him, he may, perhaps, incur the penalties of perjury should he knowingly utter what is false. 'But a friendless accused is not aware of the law in his favor.' This may be so; but in what other case is a party at liberty to set up his ignorance of the law? If the maxim of the common law, *Ignorantia legis neminem excusat*, be sound, as it unquestionably is; and if, consequently, the defence of acting in ignorance cannot protect an offender even from punishment; on what principle of justice is the accused entitled to say, 'I confessed my crime, and have sworn that my statement is true; but you, the jury, must not hear what

I said, because I was not aware of the existence of a rule of law, which would have expressly justified me in holding my peace?' If the practice of examining prisoners on oath be deemed inquisitorial and harsh, let it be discountenanced, not by rejecting a confession so obtained, but by prohibiting justices from acting in this manner, or even by rendering them liable to a penalty in case of disobedience."

¹ *People v. McMahon*, 15 N. Y. 384; *State v. Young*, Wins. (N. C.) 126. See *supra*, § 664.

² *Com. v. Harman*, 4 Barr, 269.

³ *State v. Cowen*, 7 Ired. 289. See *R. v. Stripp*, Dears. C. C. 648; 36 Eng. L. & Eq. 587.

⁴ *People v. Kelly*, 47 Cal. 125.

⁵ *Supra*, § 647.

Artifice
does not
exclude.

§ 670. A confession is not rendered inadmissible by the fact that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though the mistake was created by artifice, with a view to obtain the confession, supposing there was nothing in the artifice calculated to produce an untrue confession.¹ Nor do false statements made to the defendant exclude the answer, if such false statements did not amount to promises or threats.² Confessions elicited by a detective while disguised as a confederate are in like manner admissible.³

On the same reasoning, a letter given by the defendant to the jailer to put into the post is evidence against him though surreptitiously detained and opened.⁴

Not neces-
sary that
the induce-
ment
should be
held out di-
rectly to
the defend-
ant.

§ 671. Wherever a promise or threat is held out in such a way as to reach the defendant, although not made to the defendant directly, it will exclude the confession. "Thus, where a superior clerk in the post-office said to the wife of a postman, who was in custody for opening and detaining a letter, 'Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;' the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated to him the substance of this statement.⁵ So where, in a case of murder, government had published a handbill, offering pardon to any one of the offenders, except the person who struck the blow, who should give such information as would lead to the conviction of his accomplices; and it appeared that the prisoner was aware of this offer, and was induced by it to make a confession, the court held that what he said could not be given in evidence."⁶

§ 672. The presence of persons in authority does not *per se*

¹ R. v. Burley, 1 Phil. Evid. 104; R. v. Derrington, 2 C. & P. 418; U. S. v. Champagne, 1 Ben. 241; Com. v. Knapp, 9 Pick. 496; Com. v. Tuckerman, 10 Gray, 173; Com. v. Hanlon, 3 Brewst. 461; Price v. State, 18 Oh. St. 418; State v. Fortner, 43 Iowa, 494. Supra, § 644.

² See People v. Murphy, 63 N. Y. 590.

³ Supra, § 440.

⁴ R. v. Derrington, 2 C. & P. 418.

⁵ R. v. Harding, 1 Arm., M. & O. 340.

⁶ R. v. Boswell, C. & M. 584. Taylor's Ev. § 808. See Com. v. Morey, 1 Gray, 461; Ward v. People, 3 Hill (N. Y.), 395.

exclude a confession. Thus the confessions of a prisoner, made by him in the presence of a deputy sheriff, who had no control over the jail, to a friend who advised him to tell the truth, have been held admissible.¹

Presence of person in authority does not necessarily exclude.

The mere fact, also, that such confession was made in the presence of a jailer does not exclude it if no inducements to confess are offered.² The same position was taken in a case where the evidence was that the prisoner, when arrested, made certain confessions to the officer, who used no threats and made no promises, and the prisoner was very much frightened at the time, and spoke partly in English and partly in German; the officer not understanding the latter.³

§ 673. In conclusion, we may hold that a confession is only to be excluded on the ground of undue influence where it is elicited by temporal inducement, *e. g.* by threat, promise, or hope of favor held out to the party, in respect of his escape from the charge against him, by a person in authority, under circumstances likely to lead to a false statement; or where there is reason to presume that such person appeared to the party to sanction such a threat or promise.⁴ If the influence applied was such as to make the defendant believe his condition would be bettered by making a confession, true or false, this excludes; but if not, the confession is admissible.

Apparent authoritative influence must be applied.

¹ Supra, § 649; *R. v. Parker*, L. & C. 42; *Com. v. Smith*, 119 Mass. 305; *State v. Gossett*, 9 Rich. 428. And so where the confession was made directly to the arresting officer. *People v. Thoms*, 8 Parker C. R. 256; *Aaron v. State*, 37 Ala. 106.

² *State v. Cook*, 15 Rich. 29; *Wiley v. State*, 3 Cold. 362.

³ *People v. Thoms*, 8 Parker C. R. 256; and see *State v. Rorie*, 74 N. C. 148.

⁴ Supra, §§ 650-5; *R. v. Upchurch*, 1 Mood. C. C. 465; *R. v. Jones*, R. & R. 152; *R. v. Jenkins*, R. & R. 492; *R. v. Hearn*, C. & M. 109; *R. v. Thompson*, 1 Leach C. C. 4th ed. 291; *R. v. Parratt*, 4 C. & P. 570; *R.*

Enoch, 5 C. & P. 539; *R. v. Mills*, 6 C. & P. 146; *R. v. Thomas*, 6 C. & P. 353; *R. v. Lloyd*, 6 C. & P. 393; *R. v. Court*, 7 C. & P. 486; *R. v. Shepherd*, 7 C. & P. 579; *R. v. Drew*, 8 C. & P. 140; *R. v. Heeman*, 1 Dears. C. C. 269; *R. v. Nolan*, 1 Crawf. & Dix, 74; *R. v. Cain*, 1 Craw. & Dix, 37; *R. v. Wright*, 1 Lew. C. C. 48; *R. v. Sexton*, 1 Deac. Cr. Law, 424, 427; *R. v. Thornton*, 1 Mood. C. C. 27; *R. v. Simpson*, 1 Mood. C. C. 410; *R. v. Moody*, 2 Craw. & Dix, 347; *R. v. Luckhurst*, 1 Dears. C. C. 245; 6 Cox C. C. 243; 22 Eng. L. & Eq. 604; *People v. Wentz*, 37 N. Y. 303; *King v. State*, 40 Ala. 314; *Miller v. People*, 39 Ill. 457.

§ 674. Where the arresting officer says: "It is better for a man who is guilty to plead guilty, for he gets a lighter sentence;"¹ and where he says: "You had better tell all about it;"² these expressions have been held to vitiate confessions so induced.³ Undoubtedly the line of discrimination between the words last quoted and others which have been subjected to a contrary interpretation is difficult to draw accurately. But the principle is of easy definition. Was the inducement likely to lead to a false confession? If so, the confession must be rejected.⁴

What expressions are to be construed as likely to produce a false impression.

V. SLEEP AND DRUNKENNESS.

§ 675. We have already had occasion to observe,⁵ that the capacity of a person making a confession is to be taken into consideration in determining what credence is to be assigned to the confession. It follows that declarations made by a party during sleep are ordinarily inadmissible against him.⁶

Confessions during sleep inadmissible.

§ 676. The mere fact of intoxication, unless amounting to mania, does not exclude a confession made during its continuance,⁷ even though the intoxication was induced by a police officer, who sought in this way to lead the prisoner to confess.⁸ Confusion, however, produced by intoxication, is a fact for the jury, tending to discredit a confession.⁹

How far drunkenness excludes.

VI. HOW FAR ORIGINAL IMPROPER INFLUENCE VITIATES SUBSEQUENT CONFESSIONS.

§ 677. Where a confession has once been obtained by means of hope or fear, confessions subsequently made may be inferred to come from the same motive, and are inadmissible, though no immediate influence is shown.¹⁰ But if it appear that the original influence has ceased

When influence ceases, confession becomes admissible.

¹ Com. v. Curtis, 97 Mass. 574.

² See cases cited supra, § 651; and see also State v. York, 37 N. H. 175; Vaughan v. Com. 17 Grat. 576.

³ See supra, §§ 650-55.

⁴ Supra, §§ 650-58.

⁵ Supra, § 635.

⁶ People v. Robinson, 19 Cal. 40.

⁷ Lester v. State, 32 Ark. 727.

⁸ R. v. Spilsbury, 7 C. & P. 187; Gore v. Gibson, 13 M. & W. 625; Jeffers v. People, 5 Parker C. R. 522; Eskredge v. State, 25 Ala. 30.

⁹ Com. v. How, 9 Gray, 110; State v. Bryon, 74 N. C. 351.

¹⁰ 2 Russ. on Cr. 832; R. v. Hewett, C. & Marsh. 534; R. v. Cooper, 5 C. & P. 535; R. v. Howes, 6 C. & P.

to operate, the confessions are admissible.¹ On this reasoning, in an early case in Pennsylvania, where a boy of twelve years old, who had been indicted for arson, was urged to make a confession, by holding out the expectation of a pardon if he did and by threats of a rigorous confinement if he did not, but without effect; and afterwards on an examination before a magistrate voluntarily confessed the crime; it was ruled the confession was admissible, the early improper influence being supposed to have passed away, it being left to the jury to consider whether the prisoner had falsely declared himself guilty or not.²

But under such circumstances, after the fact is known that the influence of either hope or fear existed inducing a former confession, an explicit warning should be given the prisoner of the consequences of a confession; and it must be clear that he was relieved from the effect of the improper influence previously applied before such second confession is admissible in evi-

404; *R. v. Rue*, 18 Cox C. C. 209; *Com. v. Cullen*, 111 Mass. 435; *Com. v. Harman*, 4 Barr, 269; *State v. Roberts*, 1 Dev. 259; *Peter v. State*, 4 Sm. & M. 31; *Deathridge v. State*, 1 Sneed, 75; *State v. Guild*, 5 Halst. 163; *Ward v. State*, 50 Ala. 120; *State v. Jones*, 54 Mo. 478; *Barnes v. State*, 36 Tex. 356; *Love v. State*, 22 Ark. 336. But see *Moore v. Com.* 2 Leigh, 701.

In *R. v. Rue*, *supra*; S. C., 34 L. T. Rep. (N. S.) 400, the prisoner, a servant girl, was questioned by the mother of a child who had been found dead; and she was asked whether she had anything to do with its disappearance; upon which she cried, and said, "If you won't send for the police I will tell the truth," whereupon her mistress replied, "I will not hurt you if you tell the truth; you will be much happier if you tell the truth;" and she promised not to send for the police; whereupon the prisoner made a confession, which upon the trial was rejected as being made under an induce-

ment. It further appeared that shortly after this confession the mistress sent for a neighbor and informed him of the confession, whereupon he had an interview alone with the prisoner, and asked her questions upon the subject, but he held out no inducement, and she then made a similar confession. It was held that the second confession was so connected, under the circumstances, with the first, that it was inadmissible.

¹ *R. v. Thompson*, 1 Leach C. C. 325; *R. v. Cheverton*, 2 F. & F. 833; 2 Russ. on Cr. 824; *State v. Howard*, 17 N. H. 171; *State v. Carr*, 37 Vt. 191; *Guild's case*, 5 Halst. 163; *State v. Roberts*, 1 Dev. 259; *Peter v. State*, 4 Sm. & M. 31; *State v. Vaigneur*, 5 Rich. 391; *State v. Hash*, 12 La. An. 895; *Dinah v. State*, 39 Ala. 359; *Levison v. State*, 54 Ala. 520; *Sampson v. State*, 54 Ala. 241; *Porter v. State*, 55 Ala. 95; *People v. Jim Ti*, 32 Cal. 60; *Strady v. State*, 5 Cold. 300; *Selvidge v. State*, 30 Tex. 60.

² *Com. v. Dillon*, 4 Dall. 116.

dence.¹ When such a warning has been given authoritatively, or when the defendant has been cautioned by a person in recognized authority, that a confession would not benefit him, or that he must not say anything against himself, a subsequent confession based on this warning may be received.²

The burden is on the State to prove that the second confession was not made under influences which rendered the first inadmissible.³

¹ Meynell's case, 2 Lew. C. C. 122; Van Buren v. State, 24 Miss. 512; State v. Fisher, 6 Jones (N. C.), 478; State v. Scates, 5 Ibid. 420; State v. Gregory, Ibid. 315; State v. Jones, 54 Mo. 478.

The rule excluding such subsequent admissions was applied, after an interval of ten months in prison, in State v. Chambers, 39 Iowa, 179.

² R. v. Howes, 6 C. & P. 404; Joy on Conf. 72-4; Chabbock's case, 1 Mass. 144.

³ Deathridge v. State, 1 Sneed, 75; State v. Roberts, 1 Dev. 259; Thompson v. Com. 20 Grat. 724; Peter v. State, 4 Sm. & M. 37; Cady v. State, 44 Miss. 333.

"The prisoner, who was indicted for murder, worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own, and added, that there was no doubt he would be found guilty; it would be better for him if he would confess. A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, 'Robert, do not make him any promises.' The prisoner then made a confession. Patteson, J., on the evidence being tendered, said, 'That will not do. The constable ought to

have done something to remove the impression from the prisoner's mind.' It was then further proved that the overlooker, in about ten minutes after the above confession, delivered the prisoner to another constable, and that, when the latter received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. This constable took the prisoner to his house, and there said, 'I believe Sherington has murdered a man in a brutal manner.' The wife and brother of the prisoner were there, and they said to the prisoner, 'What made thee go near the cabin?' The prisoner in answer made a statement similar in effect to the one he had made before. The constable used neither promise nor threat to induce the prisoner to say anything, but did not caution him, and it was not more than five minutes after he received the prisoner into his charge that the prisoner made the statement. The constable was not aware that the overlooker had held out any inducement, and the overlooker was not present when the statement was made. Patteson, J., rejected the second confession, saying, 'There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received. I am of opinion in this case, that the prisoner must be considered to have

VII. HOW FAR EXTRANEOUS FACTS REACHED THROUGH AN INADMISSIBLE CONFESSION MAY BE RECEIVED.

§ 678. Although confessions made by threats or promises are not evidence, yet if they are attended by extraneous facts which show that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony;¹ *e. g.* where the party thus confessing points out or tells where the stolen property is, or where he states where the deceased was buried;² or gives a clue to other evidence which proves the case.³ But if, in consequence of the confession of the prisoner thus improperly drawn out, the search for the property or person in question proves ineffectual, no proof of confession or search will be received.⁴ And in case of larceny the property must be identified by other evidence as that which was actually stolen.⁵

Extra-
neous facts
reached
through an
inadmissi-
ble confes-
sion may
be proved.

made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination.' *R. v. Sherington*, 2 Lew. C. C. 123." Roscoe's Cr. Ev. 8th ed. 68.

¹ That this involves the admission of the confession, so far as it relates to the discovery, see *Laros v. Com.* 84 Penn. St. 200; *Sampson v. State*, 54 Ala. 241.

² 1 Ph. Ev. 411; *R. v. Warickshall*, 1 Leach, 263; *R. v. Mosey*, Ibid. 265, n., per Buller, J., and Perryn, B.; *R. v. Lockhart*, Ibid. 386; *R. v. Gould*, 9 C. & P. 364, per Tindal, C. J., and Parke, B.; *R. v. Thurtell*, cited Joy on Conf. 84; *R. v. Cain*, 1 Cr. & D. C. C. 37, per Torrens, J.; Russ. on Cr. 861, 862; *Com. v. Knapp*, 9 Pick. 496; *Duffy v. People*, 27 N. Y. 589; *State v. Brick*, 2 Harring. 580; *State v. Crank*, 2 Bailey, 67; *State v. Vaigneur*, 5 Rich. 391; *Hudson v. State*, 9 Yerg. 408; *Deathridge v. State*, 1

Sneed, 75; *Jordan v. State*, 32 Miss. 382; *Belote v. State*, 36 Miss. 96; *Jane v. Com.* 2 Metc. (Ky.) 80; *Elizabeth v. State*, 27 Tex. 329; *Mountain v. State*, 40 Ala. 344; *People v. Hoy Yen*, 34 Cal. 176; *People v. Parton*, 49 Cal. 632; *Frederick v. State*, 8 W. Va. 695.

³ *R. v. Leatham*, 8 Cox C. C. 498; *Rice v. State*, 3 Heisk. 215; *Strait v. State*, 43 Tex. 486; *State v. Mortimer*, 20 Kans. 93.

⁴ *R. v. Jenkins*, R. & R. 492; *R. v. Hearn*, C. & M. 109.

⁵ *State v. Due*, 7 Foster, 256.

Mr. Joy states the rule to be, that where confessions are not admissible, from the circumstances under which they were obtained, contemporaneous declarations of the party are receivable in evidence or not according to the attending circumstances, but any act of such party, though done in consequence of such confessions, is admissible in evidence, if it appears from a fact thereby discovered that so much of the confession as immediately re-

VIII. ADMISSIONS BY SILENCE OR CONDUCT.

§ 679. If A., when in B.'s presence and hearing, makes statements which B. listens to in silence, interposing no objection, A.'s statements may be put in evidence against B. whenever B.'s silence is of such a nature as to lead to the inference of assent.¹ Thus, although neither the

Statements silently acquiesced in may be treated as admissions. late to it is true. See *R. v. Warickshall*, 1 Leach C. C. 263; *R. v. Gould*, 9 C. & P. 364; *R. v. Harris*, 1 Mood. C. C. 338; *Com. v. Knapp*, 9 Pick. 496, 511; *R. v. Cain*, 1 Craw. & Dix, 37; *R. v. Griffin*, R. & R. 151. But see *R. v. Jones*, R. & R. 152; *R. v. Jenkins*, R. & R. 492; *Frederick v. State*, 3 W. Va. 695.

Unless the fact developed is relevant independently of the confession of guilt, it is not adequate evidence of guilt. *State v. Garvey*, 28 La. An. 925.

¹ *R. v. Bartlett*, 7 C. & P. 832; *Hayslep v. Gymer*, 1 Ad. & E. 162; *Morgan v. Evans*, 3 Cl. & F. 205; *Gaskill v. Skene*, 14 Q. B. 664; *Wiggins v. Burkham*, 10 Wall. 129; *Rea v. Missouri*, 17 Wall. 532; *Bailey v. Woods*, 17 N. H. 365; *Corser v. Paul*, 41 N. H. 24; *State v. Reed*, 62 Me. 129; *Com. v. Call*, 21 Pick. 515; *Com. v. Sliney*, 126 Mass. 49; *Jewett v. Banning*, 23 Barb. 13; *Kelley v. People*, 55 N. Y. 565; *McClenkan v. McMillan*, 6 Penn. St. 366; *Knight v. House*, 29 Md. 194; *Hagenbaugh v. Crabtree*, 33 Ill. 225; *Pierce v. Goldsberry*, 35 Ind. 317; *Green v. Harris*, 3 Ired. 210; *State v. Bowman*, 80 N. C. 432; *Wells v. Drayton*, 1 Mill (S. C.), 111; *Block v. Hicks*, 27 Ga. 522; *Drumright v. State*, 29 Ga. 430; *Alston v. Grantham*, 26 Ga. 374; *Bradford v. Haggerthy*, 11 Ala. 698; *Benziger v. Miller*, 50 Ala. 207; *People v. McCrea*, 32 Cal. 98; *People v. Estrado*, 49 Cal. 171. See 1 Cow. &

Hill N. 191; *Noonan v. State*, 1 Sm. & M. 562; *Ingle v. State*, 1 Tex. Ap. 307.

"In the case of *R. v. Newman*, 1 E. & B. 268; 3 C. & K. 252, it was sought to push this doctrine to an unwarrantable length. That was an information for libel, to which truth was pleaded as a justification under the Act of 6 & 7 Vict. c. 96, and the defendant tendered evidence to prove that the very imputations contained in the libel in question had been previously published in another work, and that the prosecutor, though well aware of that fact, had taken no steps to obtain redress. The court, however, very properly rejected the evidence, as being far too vague to be received in a court of justice as any proof of acquiescence." Taylor's Ev. § 828. See *Neile v. Jakle*, 2 C. & K. 709.

As suggesting cautions as to such evidence, see *Campbell v. State*, 55 Ala. 80.

"A statement is made either to a man, or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply; the natural inference is, that the imputation is well founded or he would have repelled it." Best on Presumptions, § 241; affirmed in *State v. Cleaves*, 59 Me. 300, and reaffirmed in *State v. Reed*, 62 Me. 142; S. P., *Kelley v. People*, 55 N. Y. 565. See also *State v. Swink*, 2 Dev. & Bat. 9; *State v. Stone*, Rice, 147; *Donnelly v. State*, 2 Dutch. 463; *Keith v. State*,

evidence nor the declaration of a wife is admissible against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer or an evasive reply, are receivable in evidence as an implied admission on his part.¹

It has been held admissible, on an indictment for an illegal operation on a woman, for an officer to testify that he took the defendant, after his arrest, into the presence of the woman, and asked her if the defendant performed an operation upon her; that the woman said he did; that the defendant asked the woman if she had been operated on previously by any other person; that the woman said, "No, she came there to be operated on to get rid of a child," to which he made no response.²

It makes no difference, in such cases, that the person making the statement acquiesced in was incompetent as a witness.³

§ 680. To give such silence, however, effect as an admission, the party charged with it must have been in a position to ex-

27 Ga. 483; *State v. Pratt*, 20 Iowa, 267.

In *People v. Ah Yute* (Supreme Court of California, 1880), 9 Rep. 604, it was held that in prosecutions for murder, the testimony of the officer who made the arrest as to statements then made by third persons in the presence of defendant and of the dead body of deceased, to the effect that defendant was guilty of the killing, and testimony that certain other persons had identified defendant at the jail soon after the arrest as the guilty party, is hearsay, unless accompanied with proof of such conduct and statements of defendant as might imply assent.

¹ *R. v. Smithers*, 5 C. & P. 332; *R. v. Bartlett*, 7 C. & P. 332.

² *Com. v. Brown*, 121 Mass. 69.

"The admission," said Morton, J., "of the statements of Emma L. Smith and Frances A. Chase, made in the presence and hearing of the defendant, was proper. The rule is, that a statement made in the presence of a

defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply, unless he intends to admit it. But if he makes a reply, wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. *Com. v. Kenney*, 12 Met. 235; *Com. v. Galavan*, 9 Allen, 271. In this case, when Emma L. Smith and Frances A. Chase stated that the defendant had performed an operation on them, he did not remain silent, but asked them in reply if they had been previously operated upon by another person."

³ *R. v. Smithers*, *R. v. Bartlett*, *ut supra*; *People v. McCrea*, 32 Cal. 98. That the inference of assent is strengthened when the statement is an answer to a question see *Andrews v. Frye*, 104 Mass. 234; *Mitchell v. Napier*, 22 Tex. 120.

plain.¹ “Before acquiescence in the language or conduct of others can be assumed as a concession of the truth of any particular statement, or of the existence of any particular fact, it must plainly appear that the language was heard and the conduct understood.”² Thus, neither a person when asleep,³ nor when intoxicated,⁴ nor a deaf person,⁵ can be in this way prejudiced by statements made in his presence; though it is otherwise of a foreigner if it appear that he understood the language spoken.⁶ Nor even under our present practice does a defendant’s silence, when charges are judicially made against him, authorize such charges to be proved against him on future trials;⁷ nor can silence, when a party is under arrest, be used as sustaining the hypothesis of acquiescence.⁸ Silence, also, while in custody, when charged with crime by a person jointly arrested, does not authorize the admission of such charge.⁹ It has also been held that statements, made by a clergyman to his congregation in a sermon, cannot be put in evidence against the congregation, although they listened in silence to the statements;¹⁰ nor generally is such silence to be deemed an assent when it is explicable on other grounds than that of consciousness of guilt.¹¹

¹ *Com. v. Kenney*, 12 Met. 235; *Com. v. Harvey*, 1 Gray, 487; *Larry v. Sherburne*, 2 Allen, 35; *Drury v. Hervey*, 126 Mass. 519; *Donnelly v. State*, 2 Dutch. 601; *Slattery v. People*, 76 Ill. 217; *Boyd v. Bolton*, Irish Rep. 8 Eq. 113. See note in 1 Hawley’s Cr. Rep. 31.

² *Com. v. Harvey*, 1 Gray, 487.

³ *Lanergan v. People*, 39 N. Y. 39.

⁴ *State v. Perkins*, 3 Hawks, 377.

⁵ *Tufts v. Charlestown*, 4 Gray, 537; *Com. v. Galavan*, 9 Allen, 271; *State v. Perkins*, 3 Hawks, 377; *Berry v. State*, 10 Ga. 511.

⁶ *Wright v. Maseras*, 56 Barb. 521.

⁷ *Child v. Grace*, 2 C. & P. 193; *R. v. Turner*, 1 Mood. C. C. 347; *R. v. Appleby*, 3 Stark. (N. P.) 33. See, however, Lord Denman’s remarks in *Simpson v. Robinson*, 12 Q. B. 512; and see *R. v. Coyle*, 7 Cox C.

C. 74; *U. S. v. Brown*, 4 Cranch C. C. 508; *Com. v. Kenney*, 12 Met. 235; *Com. v. Walker*, 13 Allen, 570; *Bob v. State*, 32 Ala. 560; *Noonan v. State*, 9 Miss. 562; *Broyles v. State*, 47 Ind. 251.

⁸ *U. S. v. Brown*, 4 Cranch C. C. 508; *Com. v. Kenney*, 12 Met. 235; *Com. v. Walker*, 13 Allen, 570; *Com. v. McDermott*, 123 Mass. 470; *Bob v. State*, 32 Ala. 560; *Noonan v. State*, 9 Miss. 562.

⁹ *Com. v. Walker*, 13 Allen, 570; *Com. v. Kenney*, 12 Met. 235; *Com. v. McDermott*, 123 Mass. 440. It is otherwise when defendant makes partial reply. *Com. v. Brown*, 121 Mass. 69. *Supra*, § 679.

¹⁰ *Johnson v. Trinity Church*, 11 Allen, 123.

¹¹ *Com. v. Harvey*, 1 Gray, 487; *Com. v. Kenney*, 12 Met. 235; *Don-*

§ 681. A party is not at common law in any way bound by the testimony of witnesses called by him and examined on a trial.¹ Even under the recent statutes, permitting the parties to be witnesses, such evidence, it has been held in Pennsylvania, cannot be employed in other suits against the party introducing it.² It is otherwise, so it has been held in Maine, in respect to the statements of witnesses made at a prior hearing of the same case, which statements the party is at liberty to contradict, he being entitled to be sworn as a witness in the case.³ But silence of this kind by a defendant on the trial of a criminal issue cannot in any view be rightfully admitted against him under the statutes providing that his non-testifying shall not be used against him.

And not as to party hearing in silence the testimony of a witness.

§ 682. The fact that an unanswered letter or other paper is found in the custody of a party, but not acknowledged by him, is not ground for the admission of the paper as evidence against him.⁴ Were it admitted, an innocent man might, by the artifices of others, be charged with a *prima facie* case of guilt which he might find it difficult to repel.⁵ It is otherwise, however, when the party ad-

Letter in possession of a party not admissible against him.

elly v. State, 2 Dutch. 601; Slattery v. People, 76 Ill. 217. See note in 1 Hawley's Cr. R. 86, and cases cited Whart. Ev. § 680.

In Com. v. Sliney, 126 Mass. 49, which was a trial for keeping a house for prostitution, a witness testified, against the defendant's objection, that he had a conversation on the piazza of the house in question with a girl; that the defendant was also at the same time out of doors, and from fifteen to twenty feet distant from him and the girl; that the girl spoke very loud, and solicited him to have criminal intercourse with her in the house, and stated that the price would be a certain sum, a portion of which she was obliged to pay the defendant. The judge instructed the jury that it was for them to say, upon the evidence, whether the defendant heard the conversation; and that, if they did not

find she heard it, they were to disregard the evidence, it being outside of the house. It was held that the defendant had no ground of exception.

¹ Melen v. Andrews, M. & M. 336; R. v. Appleby, 3 Stark. 33; R. v. Turner, 1 Mood. C. C. 347; Child v. Grace, 2 C. & P. 193; R. v. Swinner-ton, C. & M. 593; Com. v. Kenney, 12 Met. 237.

² See Ayres v. Wattson, 57 Penn. St. 360; McDermott v. Hoffman, 70 Penn. St. 52.

³ Blanchard v. Hodgkins, 62 Me. 120.

⁴ U. S. v. Crandell, 4 Cranch C. C. 683; Com. v. Edgerly, 10 Allen, 184; People v. Green, 1 Parker C. R. 11; People v. Thoms, 3 Parker C. R. 256.

⁵ See to this effect R. v. Hevey, 1 Leach C. C. 232; R. v. Plumer, R. & R. 264; Doe v. Frankis, 11 A. & E. 795; Smiths v. Shoemaker, 17 Wall. 630; Com. v. Eastman, 1 Cush. 189;

dressed in any way invited the sending to him of the letter ;¹ or when there is any ground to infer he acted on the letter.² Where

Dutton v. Woodman, 9 Cush. 262; Robinson v. R. R. 7 Gray, 92; Fearing v. Kimball, 4 Allen, 125; Com. v. Edgerly, 10 Allen, 184; People v. Green, 1 Parker C. R. 11; Waring v. Tel. Co. 44 How. (N. Y.) Pr. 69. See remarks of Lord Denman in Doe v. Frankis, 11 A. & E. 795, and of Lord Tenterden, in Fairlie v. Denton, 8 C. & P. 103.

In a portmanteau, not proved to belong to a prisoner on trial, was found a paper folded like a letter, and containing in the inside what purported to be an inventory of goods pawned at different times. The inventory was not in his handwriting; but on the outside of the paper his name, and the word private, both in his handwriting, were indorsed. It was ruled that the contents of the paper were not admissible against him. R. v. Hare, 3 Cox C. C. 247.

¹ R. v. Cooper, L. R. 1 Q. B. D. 19.

In this case, according to the report, the defendant was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts; in a fifth count for inserting, with intent to defraud the queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts, and obtaining money thereby. It was shown at the trial that the prisoner had inserted in a newspaper an advertisement contain-

ing statements found to be false, offering permanent employment in the preparation of *carte de visite* papers, and adding, "Trial paper and instructions, 1s.," and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to the prisoner under the address given in the advertisement, and had been received at the post-office like the other letters; but, having been stopped by the post-office authorities, none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post-office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted in evidence, and it was held that under the circumstances the letters were rightly received in evidence.

It was argued for the prisoner that the letters were not admissible in evidence, inasmuch as they never reached the hands or were in the possession of the prisoner, and that there was no evidence of the sending or identity of these letters, but that the senders ought to have been called. It was

² Dewett v. Piggott, 9 C. & P. 75; R. v. Horne Tooke, 25 How. St. 120; R. v. Watson, 2 Stark. 140; Smiths v. Shoemaker, 17 Wall. 630.

In Com. v. Waterman, 122 Mass. 43, it was held that a letter from the

defendant's housekeeper, intimately acquainted with his affairs, and admitted by him to have been received by him, advising him to disguise himself for the trial, was admissible against him.

such tacit recognition is claimed, the whole conversation or correspondence which constitutes the recognition must be given.¹

§ 683. Confessions may be by *acts* as well as by *words*. For a man to put on the dress of a policeman, or of an army officer, is equivalent to saying, "I am a policeman," or "I am an army officer."² Where, also, the question is whether the stationing a flagman at a crossing is requisite to public safety, the fact that a flagman has been assigned by the company to such station (he being absent at the time of the collision) may be treated as an admission by the company that a flagman should be so placed.³ In the same line may be mentioned the acts of a prisoner in hiding stolen property, and in flight,⁴ and the conduct of an accused party when informed of the accusation.⁵

Confes-
sions may
be by acts.

IX. WHAT CONFESSIONS MAY PROVE.

§ 684. We may now regard it as settled that the admissions of a party may be received when relating to the contents of a writing, without notice to produce; nor can such testimony be excluded on the ground that it is

Party's ad-
mission
may prove
contents of
writings.

further urged that if these letters were admissible, the prosecution might always manufacture evidence against a prisoner after he was in custody. To this it was replied by Lord Coleridge, C. J., that it has often been held that when a letter is put in course of transmission, the postmaster general holds it as the agent of the receiver. *R. v. Jones*, 1 Den. C. C. 551; 19 L. J. (M. C.) 162; *R. v. Burdett*, cited 4 B. & Ald. 179. For the crown it was argued that if the prisoner had been indicted in respect of any specific one of the letters in question, no doubt the sender ought to have been called; but here it was otherwise. Even apart from the authorities, which show generally that the postmaster is the agent of the person to receive a letter, here the terms of the advertisement expressly made him so. At any rate it was insisted the letters must be admissible under the last count. Under that count he might

have been guilty of an attempt, and for that they are clearly material. By the majority of the court it was held that the letters were admissible. The ground on which this decision can be best sustained is that the letters were invited by the defendant, and were in the hands of the postmaster as his agent. See *Com. v. Eastman*, 1 Cush. 189. As to agency see distinctions taken *infra*, § 695.

¹ *Mattocks v. Lyman*, 16 Vt. 113.

² See *supra*, § 223.

³ *Readman v. Conway*, 126 Mass. 374; *McGrath v. R. R.* 63 N. Y. 522. See *Penn. R. R. v. Henderson*, 51 Penn. St. 315; *West Chester R. R. v. McElwee*, 67 Penn. St. 311; *McKee v. Bidwell*, 74 Penn. St. 218; *Russell v. Miller*, 26 Mich. 1.

⁴ See *infra*, §§ 748-51.

⁵ *Ibid.*; *Com. v. McPike*, 3 Cush. 181; *Jewett v. Banning*, 21 N. Y. 27; *People v. McKee*, 36 N. Y. 113.

parol proof of a written instrument. "There does not, on principle, seem any reason why the admissions of a prisoner should not be receivable in evidence as well when they relate to the contents of a written document as when they amount to direct confessions of guilt. The rule is generally laid down in the broadest terms: *Optimum habemus testem confitentem reum*. Everything which the prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as it may seem to them to deserve."¹

Confessions not excluded because party could be examined.

§ 685. It has been also held that the rule requiring the best evidence attainable will not preclude the putting in evidence the confessions of a party, made out of court, even though he be in court, open to examination, at the time they are offered.²

§ 686. A confession, if there be independent proof of the *corpus delicti*, we have elsewhere seen,³ may prove marriage;⁴ and an admission of a party that he had been married according to the laws of a foreign country may render it unnecessary, if the confession be corroborated, to prove that the marriage had been celebrated according to the laws of that country.⁵

§ 687. It is settled, however, that an admission, whether under oath on an examination, or otherwise, is not admissible to prove record facts.⁶ It is at the same time competent to show by admissions the consequences of facts provable by record. Thus a witness can be asked whether he has not been in prison.⁷

¹ 1 Russ. on Cr. 218, n., relying on *Slatterie v. Pooley*, 6 M. & W. 669. See fully Whart. on Ev. § 1091, for the authorities in civil relations. In *R. v. Walsh*, 1 Den. C. C. 199, this rule is recognized.

² Supra, §§ 360, 429, 433; *Clark v. Hougham*, 2 B. & C. 149; *Woolray v. Rowe*, 1 Ad. & El. 114; *Brubacker v. Taylor*, 76 Penn. St. 83; *Mason v. Poulson*, 43 Md. 162.

³ Supra, §§ 170-2; Whart. on Ev. § 83.

⁴ See *Com. v. Jackson*, 11 Bush, 679.

⁵ *R. v. Newton*, 2 M. & Rob. 503, per Wightman and Cresswell, JJ.; 1 C. & K. 164, S. C., *nom. R. v. Simonsto*. But see *R. v. Flaherty*, 2 C. & K. 782; and supra, § 172.

⁶ Supra, §§ 153, 179; Whart. on Ev. §§ 63, 64, 541, 991.

⁷ Supra, § 474.

X. HOW CONFESSIONS ARE TO BE CONSTRUED.

§ 688. The admission by the defendant of a fact disadvantageous to himself will not be received, without receiving at the same time, when part of the same conversation or document, his contemporaneous declaration of a fact favorable to him, not merely as evidence that he made such assertion, but as evidence of the matter thus alleged by him in his discharge.¹ The whole relevant context is in such case to be left to the jury, who are to say whether the facts asserted by the defendant in his favor are true.²

A confession, however, is not excluded by the fact that it

¹ *Supra*, § 627; *R. v. Clewes*, 4 C. & P. 221; *R. v. Jones*, 2 C. & P. 629; *R. v. Higgins*, 3 C. & P. 603; *McCulloch v. State*, 48 Ind. 109; *Chambers v. State*, 26 Ala. 59; *Frank v. State*, 27 Ala. 37; *Haiston v. Hixen*, 3 Sneed, 691; *State v. Phillips*, 24 Mo. 476; *State v. Branstetter*, 65 Mo. 149; *State v. Napier*, 65 Mo. 462; *Massey v. State*, 1 Tex. Ap. 563; and see the Queen's case, 2 B. & B. 294. So, however, did not act Sir E. Coke, whatever he may have thought. Among the many stains which recent developments have cast on the memory of that profound jurist, but most arbitrary judge, the blackest is that which has been brought to public notice by the researches of Mr. Amos, in that very curious book, "The Great Oyer of Poisoning; the Trial of the Earl of Somerset, for the Poisoning of Sir Thomas Overbury: London, 1846." Mr. Amos places it beyond all doubt that Coke, when prosecuting officer for the crown, superintended in person the examination of prisoners; applied the most inhuman and indecent influences to extort confessions; and then, when the confession was got, altered it to suit his own purposes, striking out qualifications, and even working with his own hand into the text

glosses which would meet what he well knew would be the pinch of the case. No counsel was then allowed to the prisoner; and the fraud was either not detected, or if observed, the attempt to expose it was bluffed off by the coarse and bullying tone Coke could so well assume. But the papers themselves survive, and incorporate the original confession, with Sir E. Coke's marginal notes, erasures, and interlineations. The reports in the State Trials follow the papers as amended, and it was on them the convictions took place. The originals are now exhibited by Mr. Amos, to show how different the confession was, as actually given, from what it was when Coke procured by it a conviction. *Great Oyer, &c.* 208, 224, 342, 346.

² *Whart. on Ev.* §§ 1108-9; *Smith v. Blandy*, R. & M. (N. P.) 258; *R. v. Higgins*, 3 C. & P. 603; *R. v. Clewes*, 4 C. & P. 221; *Resp. v. M'Carty*, 2 Dall. 86; *Brown's case*, 9 Leigh, 633; *Blackburn v. State*, 23 Oh. St. 146; *Eiland v. State*, 52 Ala. 322; *Bower v. State*, 5 Mo. 364; *Green v. State*, 13 Mo. 382; *Young v. State*, 2 Yerg. 292; *Crawford v. State*, 4 Cold. 190; *State v. Worthington*, 64 N. C. 594; *Griswold v. State*, 24 Wis. 144; *Brown v. State*, 8 Tex. Ap. 139.

is part of a conversation the rest of which the witness did not hear.¹

Only the relevant parts of the context are to be received.²

That these rules are applicable to written admissions is shown in another work.³

A letter, we may add, can be put in evidence without that to which it is a reply, though if an entire correspondence be offered, it is to be given complete.⁴ Nor can a letter found on a party's person, or addressed to him, be admitted, without showing that he answered it, or invited it, or in some way acquiesced in its contents.⁵

The accuracy requisite in the reproduction, by a witness, of oral statements of another, has been already considered.⁶ It would be absurd to require an exact recital of the words used by the party whose statement is testified to. It is enough if the substance be given. But a mere vague impression of what the defendant said will not be enough.⁷

XI. HOW ADMISSIBILITY OF CONFESSIONS IS TO BE DETERMINED.

§ 689. It is the province of the court, and not of the jury, to determine whether a confession be made with that degree of freedom which is necessary to make it admissible evidence.⁸ And when there is a general objection that the confessions were made under threats, the court may inquire what these threats were, so as to ascertain their sufficiency in law to exclude the confessions.⁹ The mode of conducting

¹ *Com. v. Pitsinger*, 110 Mass. 101. *Hector v. State*, 2 Mo. 135; *Boyd v. State*, 2 Humph. 39; *Simon v. State*, 5 Fla. 285; *Brister v. State*, 26 Ala. 107; *Meinaka v. State*, 55 Ala. 47; *Whaley v. State*, 11 Ga. 125; *Clarke v. State*, 35 Ga. 75; *State v. Garvey*, 28 La. An. 925; *Carter v. State*, 37 Tex. 362; *Powell v. State*, 44 Tex. 63; *Runnels v. State*, 28 Ark. 121; *Wallace v. State*, 28 Ark. 531. When, after the case is closed, there is a conflict of fact as to whether the confessions were voluntary, the question may be argued to the jury. *Garrard v. State*, 50 Miss. 147. *Supra*, § 626.

² *Garrard v. State*, 50 Miss. 147.

³ See for cases *Whart. on Ev.* § 1103.

⁴ *Ibid.*

⁵ *Supra*, § 682; *Com. v. Eastman*, 1 Cush. 189.

⁶ *Supra*, § 231.

⁷ *Berry v. Com.* 10 Bush, 15.

⁸ *R. v. Gould*, 9 C. & P. 364; *State v. Squires*, 48 N. H. 364; *Com. v. Harman*, 4 Barr, 269; *Fife v. Com.* 29 Penn. St. 429; *Nicholson v. State*, 28 Md. 140; *Thompson v. Com.* 20 Grat. 724; *Young v. Com.* 8 Bush, 366; *State v. Fidment*, 35 Iowa, 541;

⁹ *Whaley v. State*, 11 Ga. 125; *Washington v. State*, 53 Ala. 29.

such examination is at the discretion of the court.¹ And when the defendant objects to an alleged confession on the ground that it was induced by offers of favor made to him by the officer who arrested him and had him in custody, and the officer is called by the prosecution and denies that he made such offers of favor, and the defendant then offers evidence to prove that he did, it is the duty of the judge to hear such evidence before admitting the confession.²

If the confession is on its face voluntary, the burden is on the defendant to show it to be incompetent.³ If a confession be received in evidence, it not appearing that any inducement had been held out, but, at a later period of the trial, it appears that such an inducement was held out before the making of the confession as would render it inadmissible, the judge will order the jury to disregard it, or will strike the evidence of the confession out of his notes, and if there be no other proof of guilt direct an acquittal.⁴ But to justify this course the evidence should be such as would have excluded the confession if offered in time.⁵ Ordinarily the testimony of the defendant, to show improper influence, should be offered and received before the confession is admitted.⁶ But in cases of surprise the court will permit the statement of the alleged confession to be interrupted for the purpose of showing *aliunde* that it was improperly extorted.⁷

¹ Com. v. Morrell, 99 Mass. 542.

² Com. v. Culver, 126 Mass. 464.

"It is the duty of the court, before receiving the evidence, to examine whether influences brought to bear on the defendant were such as to convey to his mind an intimation that it would be better for him to confess that he committed the crime, or worse for him if he did not; and in this way to induce a false confession." R. v. Garner, 2 C. & K. 920; S. C., 1 Den. C. C. 329; Nicholson v. State, 28 Md.

140; Barnes v. State, 36 Tex. 356. Supra, § 672.

³ Rufer v. State, 25 Oh. St. 464; though see Nicholson v. State, 28 Md. 140.

⁴ Berry v. State, 10 Ga. 511; Earp v. State, 55 Ga. 186; Cain v. State, 18 Tex. 387.

⁵ Woodford v. People, 62 N. Y. 117.

⁶ Com. v. Culver, 126 Mass. 464.

⁷ Com. v. Harman, 4 Barr, 269; Serpentine v. State, 1 How. (Miss.) 256.

XII. SELF-SERVING DECLARATIONS.

§ 690. Declarations made by a defendant in his own favor unless part of the *res gestae*, or of a confession offered by the prosecution, are not admissible for the defence.¹ *Nullus idoneus testis in re sua intelligitur.*² Hence comes the maxim, *Scriptura pro scribente nihil probat.*³ Nor is the result changed by the statutes enabling a party to be called as a witness in his own behalf. That which he could prove by his sworn statements he is not permitted to prove by statements which are unsworn. In any view, therefore, the extra-judicial self-serving declarations of a party are inadmissible for him, with the exceptions hereafter stated, as evidence to prove his case.⁴

§ 691. It is otherwise when such declarations are part of the *res gestae*.⁵ It is not, however, necessary that such declarations, to be part of the *res gestae*, should be precisely concurrent with the act under trial; it is

¹ State v. Scott, 1 Hawks, 24; Bland v. State, 2 Ind. 608; State v. Jackson, 17 Mo. 544; Golden v. State, 19 Ark. 590; Tipper v. Com. 1 Metc. (Ky.) 6; State v. Wisdom, 8 Porter, 511; Campbell v. State, 23 Ala. 44; Corbett v. State, 31 Ala. 329; Hall v. State, 40 Ala. 698; Birdsong v. State, 47 Ala. 68; Newcomb v. State, 37 Miss. 383; People v. Wyman, 15 Miss. 70; Riggs v. State, 6 Cold. 517. See §§ 262 et seq.

² L. 10. D. xxii. 5.

³ See more fully Whart. on Ev. §§ 170, 265, 1101.

⁴ Handly v. Call, 30 Me. 9; Buswell v. Davis, 10 N. H. 413; Judd v. Brentwood, 46 N. H. 430; Jacobs v. Whitcomb, 10 Cush. 255; Nourse v. Nourse, 116 Mass. 101; Com. v. Sturivant, 117 Mass. 122; North Stonington v. Stonington, 31 Conn. 412; Downs v. R. R. 47 N. Y. 83; Graham v. Hollinger, 46 Penn. St. 55; Murray v. Cone, 26 Iowa, 276; Hogsett v. Ellis, 17 Mich. 351; White v. Green,

5 Jones (N. C.), 47; Gordon v. Clapp, 38 Ala. 357; Marx v. Bell, 48 Ala. 497; Ray v. State, 50 Ala. 104; Heard v. McKee, 26 Ga. 332; Bowie v. Maddox, 29 Ga. 285; Hall v. State, 48 Ga. 607; Tucker v. Hood, 2 Bush, 85; Darrett v. Donnelly, 38 Mo. 492; State v. Brown, 64 Mo. 367; Rice v. Cunningham, 29 Cal. 492.

⁵ Com. v. Rowe, 105 Mass. 590. See R. v. Crowhurst, 1 C. & K. 370; R. v. Smith, 2 C. & K. 207; Milne v. Leisler, 7 H. & N. 786; Green v. Bedell, 48 N. H. 546; Blake v. Damon, 103 Mass. 199; Beardslee v. Richardson, 11 Wend. 25; Tomkins v. Saltmarsh, 14 S. & R. 275; Loudon v. Blythe, 16 Penn. St. 532; Potts v. Everhardt, 26 Penn. St. 493; Little v. Com. 25 Grat. 921; Purkiss v. Benson, 28 Mich. 538; State v. Abbott, 8 W. Va. 741; O'Shields v. State, 55 Ga. 696; Flanders v. Maynard, 58 Ga. 56; Head v. State, 44 Miss. 731; Colquitt v. State, 34 Tex. 550; Taliaferro v. State, 40 Tex. 522; Maddox

enough if they spring from it, and are made under circumstances which preclude the idea of design.¹ The test is, were the declarations the facts talking through the party, or the party's talk about the facts. *Instinctiveness* is the requisite, and when this obtains, the declarations are admissible.² Hence a defendant's explanations, immediately upon stolen goods being found in his possession, are admissible,³ and so are the defendant's utterances coincidently with the commission of the offence charged.⁴ But when the declarations are distinguishable in point of time, and are open to the suspicion of being part of the defendant's plan of defence, they must be ruled out.⁵ Thus, on an indictment against a prisoner for having in his possession coining tools, with intent to use them, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instruments, as to the purpose for which he wished them made.⁶ Where also a defendant, in conversation with a witness, admitted the existence of a particular fact which tended strongly to establish his guilt, but coupled it with an explanation which, if true, would exculpate him, it was held that the accused could not show that he had at other times made the same statement and explanation to others.⁷ So one indicted for murder cannot give in evidence his own conversations, had after going half a mile from the place of murder, when he has had time to collect himself to make out his case.⁸ And so where a defendant, indicted for murder, was met after the transaction at some distance from the scene with blood on his hands, it was held that his declarations at the time to account for the blood on his hands, and other suspicious circumstances, were not admissible;⁹ and this, though there was no person present when the homicide was committed.¹⁰

§ 692. A party may in certain cases show by his own contem-

v. State, 41 Tex. 205; State v. Gar- K. 207; Com. v. Millard, 1 Mass. 6; rand, 5 Oregon, 216. Supra, § 263, State v. Jones, 3 Dev. & B. 122.

264.

⁴ Supra, §§ 262-3.

¹ State v. Vincent, 24 Iowa, 570; People v. Vernon, 35 Cal. 49; State v. Patterson, 63 N. C. 520; and see cases cited supra, § 264.

⁵ State v. Brown, 64 Mo. 367. See supra, § 263.

⁶ Com. v. Kent, 6 Met. § 221.

⁷ Earhart's case, 9 Leigh, 671.

⁸ Gardner v. People, 3 Scam. 83.

² See supra, §§ 262-3.

⁹ Scaggs v. State, 8 Sm. & M. 722.

³ Infra, § 761; R. v. Smith, 2 C. &

¹⁰ Bland v. State, 2 Ind. 608.

poraneous statements, that he was acting at the particular moment, not illegally, but under the direction of the law. Thus it was ruled that an officer indicted as an accessory to a burglary may, for the purpose of explaining his frequent intercourse with those indicted as principals, and to prove his own diligence and fidelity in pursuing them, give in evidence the conversations between himself and another officer as to the best means of gaining their confidence and thereby bringing them to justice, and also the information received by him in answer to inquiries made of persons whom he met while in pursuit of the burglars.¹

§ 693. Another exception to the rule that self-serving declarations are inadmissible is to be found in the reception, under the limitations already noticed, of a party's declarations as to his physical or mental condition, when such are in controversy.²

§ 694. When a defendant's statements in his own behalf are admissible, their weight is for the jury,³ and they can be disproved by the prosecution.⁴

XIII. AGENTS.

§ 695. When the relation of principal and agent in a particular transaction is established, the agent's admissions may be imputed to the principal,⁵ if his agency extends to making such admissions. Hence the declarations of a messenger sent to a third party by the prisoner, if made with reference to the object of the mission, are admissible in evidence against him, where the evidence shows they were made by his authority.⁶ But it should be remembered that before the

¹ Com. v. Robinson, 1 Gray, 555.
See supra, § 274.

² Supra, §§ 271-4.

³ Tipton v. State, Peck (Tenn.), 308; Conner v. State, 34 Tex. 659.

⁴ R. v. Jones, 2 C. & P. 620.

⁵ Whart. on Ev. § 1170; Cliquot's Champagne, 3 Wall. 114; Com. v. Boott, Thach. C. C. 390; State v. Taylor, 3 Brev. 243.

⁶ Browning v. State, 33 Miss. 48.

The statements as well as the conduct of an agent, during the performance of a tort, are imputable to the principal, as part of the *res gestae*, whenever the tort itself is so imputable. Thus the admission of the captain of a steamer, as to damage to crops on shore by fire from the steamer, made while she was running under his command, and at the time the fire was communicated, are evi-

admissions of the agent can be proved, the fact of agency should first be established *aliunde*.¹ And it has been questioned whether the admissions of an agent, not a co-conspirator, unless part of the *res gestae*, can be put in evidence if the agent himself could be called to substantiate the facts admitted.²

§ 696. It has been argued that, to impute the agent's act to the

dence against the owners who employed him; *Gerke v. Steam Nav. Co.* 9 Cal. 251; and so of the admissions of a captain of a vessel at the time of carrying off a slave; *Price v. Thornton*, 10 Mo. 135; and of the declarations of the servants of a railroad company at the time of a collision; *Toledo R. R. v. Goddard*, 25 Ind. 185; and of the admissions of the servant of a common carrier during the period of the carrying, if such admissions are not narratives of a past act. *Packet Co. v. Clough*, 20 Wall. 528; *Burnside v. R. R.* 47 N. H. 554. But if made after there has been an interval giving time for reflection, then, unless the agent be empowered to speak for the company at such time, statements of the agent, explaining or even admitting the act, cannot be received, though he continues in the principal's employment.

¹ Whart. on Ev. § 1188; *U. S. v. Morrow*, 4 Wash. C. C. 733; *Lambert v. People*, 76 N. Y. 220.

² "An admission by the party himself is in all cases the best evidence which can be produced, and supercedes the necessity of all further proof; and in civil cases the rule is carried still further, for the admission of an agent made in the course of his employment, and in accordance with his duty, is as binding upon the principal as an admission made by himself. But this has never been extended to criminal cases. Where a party is charged with the commission of an offence through the instrumen-

talities of an agent, then it becomes necessary to prove the acts of the agent; and, in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced. Thus, on the impeachment of Lord Melville by the House of Lords, it was decided that a receipt given in the regular and official form by Mr. Douglas, who was proved to have been appointed by Lord Melville to be his attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money, and to give receipts for the same, and *who was dead*, was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster did receive from the exchequer a certain sum of money in the ordinary course of business. 29 How. St. Tr. 746. Had, however, Mr. Douglas been alive at the time, there can be no doubt that he must have been called; and that he might have been called to prove the receipt of the money would probably not have been questioned. This case does not, therefore, as sometimes appears to have been thought, in any way touch upon the rule that the admission of an agent *does not* bind his principal in criminal cases, but merely shows that, where the acts of the agent have to be proved, those acts may be proved in the usual way." *Roscoe's Cr. Ev.* 8th ed. 52. See as to agency *R. v. Cooper*, L. R. 1 Q. B. D. 19; quoted *supra*, § 682.

principal, a criminal design must be brought home to the principal.¹ But proof that a guilty intent existed on the part of the principal cannot be necessary in cases where the principal (*e. g.* a corporation) is indicted for negligence, and the acts or declarations of the negligent agent are offered to prove the negligence.²

We have already seen that an allegation that an act was done by a principal may be sustained by proof that it was done by an agent.³

§ 697. In another volume⁵ will be found a discussion of the cases in which irregularities are held curable by waiver ; and in most of these cases it will be found, on examination, that the waiver was by attorney. As a matter

¹ See *Cooper v. Slade*, 6 H. L. C. 746.

"The act of the agent or servant," says Mr. Taylor, commenting on this case, "may be shown in evidence, as proof that such an act was done; for a fact must be established by the same evidence, whether it be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the principal may be affected by the fact, when so established. For though the wrongful or fraudulent act of the agent may involve his principal civilly (*Taylor's Ev.* § 827, citing *Barwick v. Eng. Jt. Stock Bk.* 2 L. R. Ex. 259, per Ex. Ch.; 36 L. J. Ex. 174, S. C.; *Proudfoot v. Montefiore*, 2 L. R. Q. B. 511; 8 B. & S. 510, S. C.), it cannot convict him of a crime, unless further proof be given that the principal has directed, or, at least, assented to such act. *Ld. Melville's case*, 29 How. St. Tr. 764; the *Queen's case*, 2 B. & B. 306, 307. Where it was proposed to show that an agent of the prosecutor, not called as a witness, had offered a bribe to a witness, who also was not called, the evidence was held inadmissible; though the general doctrine, as above stated, was

recognized. The *Queen's case*, 2 B. & B. 302, 306-9. The rule thus generally laid down is open to an apparent exception in the case of the proprietor of a newspaper, who is, *prima facie*, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge. But Lord Tenterden considered this case as falling strictly within the principle of the rule; for 'surely,' said he, 'a person who derives profit from, and furnishes means for carrying on, the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was individually concerned in the particular publication.' *R. v. Gutch*, M. & M. 433, 437. Yet even here the defendant may prove, if he can, that the publication was made by his servant without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part." 6 & 7 Vict. c. 96, s. 7.

² Whart. on Ev. § 1174.

³ *Supra*, § 102.

⁴ Whart. on Ev. § 1190.

⁵ Whart. Cr. Pl. & Pr. § 733.

of practice, subject to exceptions in those cases in which a defendant is required to plead or otherwise answer in person, an attorney, by admissions made during the trial of a case, or in correspondence relating to such trial, may bind his client, in criminal as well as in civil issues; and such admissions, part of a mutual plan for the trial of the case, are irrevocable by the client, except in cases of fraud or of gross mistake.¹

The admissions of a referee are to be in like manner limited. Thus, when the president of an insurance company refers an inquirer to a third person, who he said was book-keeper and chief man, for information, this does not make admissible against the president, on an indictment against him, statements made in his absence by the book-keeper as to the assets of the company.²

XIV. CO-CONSPIRATORS.

§ 698. In cases of crimes perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator, or accomplice, in the prosecution of the enterprise, is considered the act or declaration of all, and therefore imputable to all. Declara-
tions of ad-
missible
against
each other. All are deemed to assent to, or command, what is said or done by any one in furtherance of the common object.³ A foundation,

¹ Whart. on Ev. § 1184.

² *Lambert v. People*, 6 Abb. New Cas. 181; S. C., 76 N. Y. 220.

³ *R. v. Kerrigan*, 9 Cox C. C. 441; *U. S. v. Gooding*, 12 Wheat. 469; *U. S. v. Hinman*, 1 Bald. 232; *U. S. v. McKee*, 3 Dill. 546; *Lincoln v. Claffin*, 7 Wall. 132; *Jacobs v. Shorey*, 48 N. H. 100; *State v. Larkin*, 49 N. H. 139; *Jenne v. Joslyn*, 41 Vt. 478; *Bridge v. Eggleston*, 14 Mass. 250; *Wiggins v. Day*, 9 Gray, 97; *State v. Grady*, 34 Conn. 118; *Waterbury v. Sturdevant*, 18 Wend. 353; *Dart v. Walker*, 3 Daly, 138; *Scott v. Baker*, 37 Penn. St. 330; *McCabe v. Burns*, 66 Penn. St. 356; *Kehoe v. Com.* 85 Penn. St. 127; *Duffy v. Com.* S. C. Penn. 1878; *Donelly v. Com.* Ibid.; *Claytor v. Anthony*, 6

Rand, 285; *Martin v. Com.* 2 Leigh, 745; *State v. Poll*, 1 Hawks, 442; *State v. George*, 7 Ired. 321; *Malone v. State*, 8 Ga. 408; *Ellis v. Dempsey*, 4 W. Va. 126; *Snyder v. Laframboise*, Breese, 268; *Williams v. People*, 54 Ill. 425; *Williams v. State*, 47 Ind. 568; *People v. Pitcher*, 15 Mich. 397; *Miller v. Sweitzer*, 22 Mich. 391; *Raisler v. Springer*, 38 Ala. 703; *Mason v. State*, 42 Ala. 532; *Blount v. State*, 49 Ala. 381; *Smith v. State*, 52 Ala. 407; *Browning v. State*, 30 Miss. 656; *Street v. State*, 43 Miss. 1; *Cornelius v. Com.* 15 B. Mon. 539; *Harrison v. Wisdom*, 7 Heisk. 99; *Gray v. Nations*, 1 Ark. 557; *Glory v. State*, 13 Ark. 236; *Ferguson v. State*, 32 Ga. 658; *People v. Trim*, 39 Cal. 75; *People v. Cotta*,

however, must first be laid *aliunde*,¹ by proof sufficient, in the opinion of the court, to establish *prima facie* the fact of conspiracy between the parties; the question of such conspiracy being ultimately for the jury.²

Such conspiracy being proved (which is usually inductively from circumstances), the declarations of one co-conspirator, in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter.³ Thus where two persons are proved

49 Cal. 167; *People v. Estrada*, 49 Cal. 171; *Hightower v. State*, 22 Tex. 605.

¹ See *Com. v. Crowninshield*, 10 Pick. 497; *Com. v. Ingraham*, 7 Gray, 46; *Clawson v. State*, 14 Oh. St. 234; *State v. Daubert*, 42 Mo. 239; *Browning v. State*, 30 Miss. 656; *Jones v. Com.* 2 Duv. 554; *Hightower v. State*, 22 Tex. 605; *Myers v. State*, 6 Tex. Ap. 1.

² 1 East P. C. c. 2, s. 37, p. 96; 2 Stark. Ev. 326; 1 Phil. Ev. 447, citing the Queen's case, 2 B. & B. 302; 2 Russ. on Cr. 697; *U. S. v. Hartwell*, 3 Cliff. 221; *U. S. v. McKee*, 3 Dill. 546; *U. S. v. Cole*, 5 McLean C. C. 513; *American Fur Co. v. U. S.* 2 Pet. 365; *Com. v. Brown*, 14 Gray, 419; *Ormsby v. People*, 53 N. Y. 472; *State v. Nash*, 7 Iowa, 347; *Hamilton v. People*, 29 Mich. 195; *State v. George*, 7 Ired. 321; *Garrard v. State*, 50 Miss. 147; *State v. Ross*, 29 Mo. 32; *Matthews v. State*, 6 Tex. Ap. 23.

The law on this subject was thus stated by Mr. Starkie: "It seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy; though consultations for that purpose, and letters written in prosecution of the design, even if not sent, are admissible. The existence of a

conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger, that a conspiracy existed amongst others to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on principle fully established, would not make the assertion evidence of the fact against strangers."

³ Stark. Ev. 235. And this doctrine has been recognized by Mr. Serjeant Russell, 2 Russ. by Greav. 697, and by Sir J. Stephen in Roscoe's Cr. Ev. pp. 417-8. As to admissibility of acts of co-conspirators see Whart. Crim. Law, 8th ed. § 1404.

⁴ *R. v. Stone*, 6 T. R. 528; *R. v. Kerrigan*, 9 Cox C. C. 441; *Nudd v. Burrows*, 91 U. S. 426; *U. S. v. Hinman*, 1 Bald. 292; *U. S. v. Gooding*, 12 Wheat. 467; *U. S. v. Graff*, 14 Blatch. 381; *Lee v. Lamprey*, 43 N. H. 13; *Com. v. Crowninshield*, 10 Pick. 497; *Com. v. Waterman*, 122 Mass. 43; *State v. Grady*, 34 Conn. 18; *State v. Soper*, 4 Shepley, 293; *Apthorp v. Comstock*, 2 Paige, 482; *Ormsby v. People*, 53 N. Y. 472; *Burns v. McCabe*, 72 Penn. St. 309; *Confer v. McNeal*, 74 Penn. St. 112; *Clawson v. State*, 14 Oh. St. 234; *People v. Pitcher*, 15 Mich. 397; *Williams v. State*, 54 Ill. 423; *Chicago R. R. v. Collins*, 56 Ill. 212; *Philpot*

to have obtained goods by false pretences, evidence that one of them, in pursuit of the common aim, made the false pretences charged, warrants the conviction of both.¹ So if there is concert between two or more to pass counterfeit notes, or any concurrent action in passing them, the declaration of one is evidence against the other; and the possession of counterfeit notes by one is possession by the other.² And this co-responsibility holds good without regard to the time when the party entered the combination. He becomes subsequently responsible for every thing which may be done or said by any one of the others, in furtherance of such common design.³ Thus, on an indictment against the owner of a ship for violation of the statutes against the slave-trade, evidence of the declarations of the master, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner in the conduct of the guilty enterprise, is admissible against the owner, irrespective of the question of the time of entrance of the several parties into the plot.⁴

§ 698 *a*. As it sometimes may interfere with the proper development of the case to require the trial to begin with proof of the conspiracy, in such case the prosecution

Order of
testimony.

v. Taylor, 75 Ill. 309; *Jones v. State*, 64 Ind. 473; *Martin v. Com.* 2 Leigh, 745; *State v. George*, 8 Ired. 321; *Bryce v. Butler*, 70 N. C. 585; *Stewart v. State*, 26 Ala. 44; *Bushnell v. Bank*, 20 La. An. 464; *State v. Jackson*, 29 La. An. 354; *State v. Clark*, 32 Ark. 231; *State v. Adams*, 20 Kans. 311; *People v. Geiger*, 49 Cal. 643. That the admission must be in pursuance of the common design see *People v. Martin*, 47 Cal. 114.

“The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the *latter's* absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs. The court placed their admissibility on that ground, and instructed the jury that if they were made after

the consummation of the enterprise, they should not be regarded.” *Field, J., Lincoln v. Claffin*, 7 Wall. 133, 139.

¹ *Com. v. Harley*, 7 Met. 462.

² *U. S. v. Hinman*, 1 Bald. 292.

³ *R. v. Watson*, 32 How. St. Tr. 7, per Bayley, J.; *R. v. Brandreth*, 32 How. St. Tr. 857, 858; *R. v. Hardy*, 24 How. St. Tr. 451–453, 475; *R. v. Hunt*, 3 B. & Ald. 566; 1 East P. C. 97, s. 38; *Nichols v. Dowding*, 1 Stark. 81; *American Fur Company v. U. S.* 2 Pet. 358, 365; *U. S. v. Hinman*, 1 Bald. 292; *Crowninshield's case*, 10 Pick. 497; *Gardner v. People*, 3 Scam. 90; *State v. Haney*, 2 Dev. & Bat. 390; *Martin v. Com.* 2 Leigh, 745; *Kirby v. State*, 7 Yerg. 259; *Frank v. State*, 27 Ala. 38.

⁴ *U. S. v. Gooding*, 12 Wheat. 460.

may, on the trial, prove the declarations and acts of one made and done in the absence of the others, before proving the conspiracy between the defendants, provided proof of such conspiracy is afterwards made.¹

§ 699. When, however, the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the others.² His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself.³ Even the most solemn admission made by him after the conspiracy is at an end is not evidence against his accomplices.⁴ Nor can the flight of one conspirator after such time be put in evidence against the others;⁵ and what one of the party has been heard to say at a time other than that of the conspiracy, as to the share which the others had in the execution of the common design, or as to the object of the conspiracy, cannot be admitted as evidence against them.⁶

¹ Whart. Crim. Law, 8th ed. § 1401; People v. Brotherton, 8 Cal. 444. In Bloomer v. State, 48 Md. 321, it was held that this mode of proceeding rests in the discretion of the judge, and in seditious or other political conspiracies is seldom permitted, but that the admission of such testimony is not error.

² 1 Phil. & Am. on Ev. 215, n.; Whart. on Ev. § 1206; U. S. v. White, 5 Cranch C. C. 38; State v. Pike, 51 N. H. 105; State v. Westfall, 49 Iowa, 328; Lynes v. State, 36 Miss. 317; State v. Duncan, 64 Mo. 262; Strady v. State, 5 Cold. 300; Clinton v. State, 20 Ark. 216; People v. Collins, 48 Cal. 277; People v. English, 55 Cal. 212.

³ R. v. Stone, 6 T. R. 528; R. v. Turner, 1 Mood. C. C. 347; R. v. Appleby, 3 Stark. 33; and see Melen v. Andrews, 1 M. & M. 336, per Parke, J.; State v. Fuller, 39 Vt. 74; Com. v. Thompson, 99 Mass. 444; Hunter v. Com. 7 Grat. 641; Hudson v. Com.

2 Duv. 531; Rufer v. State, 25 Oh. St. 464; Spencer v. State, 31 Tex. 64; Ake v. State, 31 Tex. 416.

⁴ R. v. Hearne, 4 C. & P. 215; R. v. Fletcher, 4 C. & P. 250; R. v. Hall, Lew. C. C. 110; R. v. Walkley, 6 C. & P. 175; Com. v. Ingraham, 7 Gray, 46; Ormsby v. People, 53 N. Y. 472; Hook v. Boteler, 4 Har. & McH. 349; Morrison v. State, 5 Ohio, 439; State v. Arnold, 48 Iowa, 566; State v. Poll, 1 Hawks, 442; State v. Haney, 2 Dev. & Bat. 390; State v. Rawles, 65 N. C. 334; Kirby v. State, 7 Yerg. 259; Jones v. Com. 2 Duv. 554; Lawson v. State, 20 Ala. 66; People v. Moore, 45 Cal. 19; Phillips v. State, 6 Tex. Ap. 364.

⁵ People v. Stanley, 47 Cal. 112.

⁶ 1 Phil. Ev. 94; R. v. Salter, 5 Esp. 125; 2 Stark. 141; R. v. Roberts, 1 Camp. 399; State v. Poll, 1 Hawks, 442; State v. Haney, 2 Dev. & Bat. 390; Kirby v. State, 7 Yerg. 259; and see R. v. Hunt, 3 B. & Ald. 566; Wright v. State, 43 Tex. 170.

§ 700. It makes no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations any more evidence against another than they were before; the principle upon which they are admissible at all being that the act or declaration of one is the act or declaration of all united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted.¹

Rule not affected by the parties being co-defendants.

§ 700 *a*. A person acting as a decoy is not in law a confederate so that his acts may be imputable to the principal.²

Decoy not a co-conspirator.

§ 701. It is not material what the nature of the indictment is, provided the offence involve a conspiracy. Upon an indictment for murder, for instance, if it appear that others, together with the prisoner, conspired to perpetrate the crime, the act of one, done in pursuance of that intention, would be evidence against the rest.³ But there must be

Form of prosecution not material.

If on a charge of a conspiracy to annoy a broker who distrained for church-rates, it be proved that one of the defendants (the other being present) excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but what a person who was at the meeting said some time after, when he was himself distrained upon for church-rates, is not receivable in evidence. *R. v. Murphy*, 8 C. & P. 297.

Where A. was charged with having conspired with W. I., and others unknown, to raise insurrections and obstruct the laws, and it was proved that A. and W. I. were members of a Chartist Lodge, and that A. and W. I. were at the house of the latter on a certain day, on the evening of which A. directed people as-

sembled at the house of W. I. to go to the race-course at P., whither W. I. and other persons had gone; it was held, that on the trial of A. evidence was receivable that W. I. had at an earlier part of the same day directed other persons to go to the race-course; and it being proved that W. I. and an armed party of the persons assembled went from the New Inn, it was ruled that evidence might be given of what W. I. said at the New Inn, it being all one transaction. *R. v. Shellard*, 9 C. & P. 277.

¹ *R. v. Stone*, 6 T. R. 528; *R. v. Hearne*, 4 C. & P. 215; *R. v. Fletcher*, 4 C. & P. 250; *R. v. Hall*, 1 Lew. C. C. 110; *R. v. Walkley*, 6 C. & P. 175; *Com. v. Ingraham*, 7 Gray, 46; *Lawson v. State*, 20 Ala. 66; *State v. Weasel*, 30 La. An. 919.

² *Williams v. State*, 55 Ga. 391. As to decoys see *supra*, § 440.

³ *R. v. Stone*, 6 T. R. 528.

such a conspiracy as would make the one party the agent of the other. Hence the admissions of A., charged with adultery with B., are not, without showing conspiracy, admissible against B.¹

Principal's
acts ad-
missible
against
accessary.
§ 702. Where the accessory is tried alone before conviction of the principal, and when confederacy between the two has been shown, acts and conduct of the principal, immediately following the commission of the offence, and tending to show that he committed it, are competent evidence to prove the guilt of the principal.² And generally, as soon as the confederacy is proved, the acts and declarations of the one are admissible against the other.³

Declara-
tions of
co-conspir-
ators in
each
other's
favor.
§ 703. A declaration of a conspirator in favor of a fellow conspirator cannot, from the nature of things, be put in evidence, unless part of the *res gestae*, or part of a conversation put in evidence by the prosecution.⁴ Such evidence, if not inadmissible on other grounds, is inadmissible as hearsay.⁵

¹ State v. McGuire, 50 Iowa, 153.

² State v. Rand, 33 N. H. 216.

³ R. v. Pym, 1 Cox C. C. 340; U. S. v. Hartwell, 3 Cliff. 233. Supra, § 237. As to admission of record of conviction of principal against accessory see supra, § 602.

⁴ U. S. v. Douglass, 2 Blatch. 207; Lyon v. State, 22 Ga. 399; Edwards v. State, 27 Ark. 493; Draper v. State, 22 Tex. 400; State v. McNamara, 3 Nev. 70.

⁵ Supra, § 225.

CHAPTER XIV.

PRESUMPTIONS.

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I. GENERAL CONSIDERATIONS.

§ 707. A PRESUMPTION of law is a juridical postulate that a particular predicate is universally assignable to a particular subject.¹ A presumption of fact is a logical argument from a fact to a fact; or, as the distinction

Presump-
tion of law
is a jurid-
ical pos-
tulate;

¹ See this illustrated *infra*, § 714.

presump-
tion of fact
is an argu-
ment from
fact to
fact.

is sometimes put, it is an argument which infers a fact otherwise doubtful from a fact which is proved.¹ Hence, a presumption of fact, to be valid, must rest on a fact in proof.²

§ 708. Presumptions are usually classified as follows: —

Prevalent
classifica-
tion.

1. Irrebuttable or absolute presumptions of law, *præsumtiones juris et de jure*.

¹ Windscheid's Pandekt. i. § 138.

² "No inference of fact or of law," says a learned judge of the Supreme Court of the United States, "is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Stark. on Evid. p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open or visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. Douglass v. Mitchell, 35 Penn. St. 440." . . . Strong, J., U. S. v. Ross, 92 U. S. 284; aff. in Manning v. Ins. Co. U. S. Sup. Ct. 1880. In R. v. Eurdett, 4 B. & Ald. 161, Abbott, C. J., said:

"A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment." . . .

That presumptions must rest on established facts see *Richmond v. Aiken*, 25 Vt. 324; *Tanner v. Hughes*, 53 Penn. St. 289; *McAleer v. McMurray*, 58 Penn. St. 126; *Justice v. Lang*, 52 N. Y. 323; *O'Gara v. Eisenlohr*, 38 N. Y. 26; *People v. Hensing*, 28 Ill. 410; *Graves v. Colwell*, 90 Ill. 268; *Allison v. State*, 42 Ind. 354; *Hamilton v. People*, 29 Mich. 193; *Frost v. Brown*, 2 Bay (S. C.), 133; *Bach v. Cohn*, 3 La. An. 103; *Pennington v. Yell*, 11 Ark. 212; *Lawhorn v. Carter*, 11 Bush, 7. To the same effect is *Bonnier, Traité des Preuves*, ii. 387, 420.

For other points bearing on presumptions of fact see *Mead v. Parker*, 115 Mass. 413; *Hamilton v. People*, 29 Mich. 198.

Sir J. Stephen (Ev. p. 2) defines a "presumption" "as a rule of law that courts and judges (juries?) shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved." This excludes presumptions *juris et de jure*.

2. Rebuttable or provisional presumptions of law, *praesumptiones juris*;

3. Presumptions of fact, *praesumptiones hominis*; which presumptions are always rebuttable, and are determinable by free logic.

§ 709. The classical Roman law recognized only two kinds of evidence: (1.) persons (*testes*), and (2.) things (*instrumenta*). Both *testes* and *instrumenta* are to be weighed by the standard of logic applied to the case as it comes up, and not by that of technical jurisprudence announced before the case is heard.¹ In the whole of the Corpus Juris we meet with no such expressions as *praesumptio juris* and *praesumptio hominis*.² By the classical Roman law, what we now call presumptions were at the highest only inferences from facts in proof.³ The question of the force of such inference was for the logician; and though they are noticed frequently by the jurists, they are styled not *praesumptiones*, but *signa*, *argumenta*, or *exempla*.⁴

Presump-
tions of
law un-
known to
classical
Romans.

§ 710. Under the schoolmen, however, to whom we owe several ponderous treatises on presumptions and proofs still cited as authoritative, a new era came in. There was no such thing, when the schoolmen wrote, as a practical jurisprudence, with its two distinctly marked provinces of law and fact. There were no juries, and but few competent judges; and the object of those who then wrote law books was to deprive those to whom the trial of cases was to be committed of any discretion as to the value they were to attach to evidence produced before them. Hence the scholastic jurists devoted themselves to constructing a series of maxims by which every case they could conceive of was to be ruled. We may take as an illustration the maxim, so frequently adopted in our own books, that an old grudge, when proved, is presumed to continue, so that a homicide committed by a person who is shown to have previously harbored a grudge against the deceased is to be considered malicious. As a general psychological proposition,

Prevalent
classifica-
tion of
scholastic
origin.

¹ Whart. on Ev. § 1228.

² See Durant, i. c. nr. 19; Endemann, Beweislehre, § 19.

³ Bonnier (Traité des Preuves, ii. 418) throws overboard the scholastic terms of a body, styling them "ces expressions barbares."

⁴ See Quinct. v. c. 8.

we might be ready to assert the same principle even now ; yet who would now undertake to say that this proposition is to rule every case of homicide in which an old grudge is proved ? “ Do we not know,” so one familiar with human nature would argue, “ that there are no two persons in whom an old grudge operates precisely in the same way ? Do not some persons harbor old grudges tenaciously for years, while others speedily forget them ? Do not soldiers, for instance, whose warfare is open and direct, whose enemies are impersonal rather than personal, whose scenes of action frequently change, and who are fully absorbed in each new event as it rushes in, rapidly forget old grudges ; and do not, on the other hand, secluded men, in the habit of nursing single passions in solitude, nourish old grudges for years ? ” “ Yes, indeed,” so would answer the casuist, “ this is all true, so I will provide some additional rules.” “ A soldier,” so the proviso would run, “ is presumed to hold to an old grudge only until he engages in some new absorbing enterprise.” “ But suppose your soldier to be a man of dark purposes, who has been concerned continuously in bitter feuds of which the homicide with which he is charged is part.” “ For this case, also,” answers the casuist, “ we will provide a rule. With such persons old grudges are presumed to continue indefinitely.” It is in this way the old scholastic books on presumptions were made up. Certain psychological rules, reached by an induction sometimes very imperfect, were announced as exhaustively covering the whole sphere of crime. A soldier, for instance, to take the modification of the doctrine of old grudge given above, is shown to have been involved for years in a private feud, and in apparent pursuance of this feud he commits a homicide. If so, the homicide is presumed to be malicious ; and it does not avail him to show that the old grudge was really at the time of the encounter dormant in his breast, and was suddenly stung into unrestrainable fury by an atrocious attack. Nor was it only the domain of psychology that these presumptions seized. They took equal possession, and with greater plausibility, of the realms of physical science. Conclusions which the science of the day regarded as established, the jurisprudence of the day treated as absolute and irrebuttable. Hence the books were filled with rules, called irrebuttable presumptions of law, many of which were false in fact, and

others subject to such numerous exceptions that at the best they are only *prima facie* authoritative.

§ 711. The assignment of irrebuttability to presumptions, however, is as repugnant to the practical jurisprudence of common life as it is to the philosophical jurisprudence of classical Rome. There is no such thing, so we learn when we compare criminal trials, as either an old grudge, or an evil intent, or a negligence, which reproduces itself without variation. Every new trial presents some new combinations which require independent induction. And when we come to physical laws, the impossibility of establishing irrebuttable presumptions, as rules to determine each case in advance, becomes still more manifest. Human nature as an aggregate may be the same now as it was in the days of the schoolmen, though in no two persons do the same phases of human nature present themselves. But physical nature is now very different from what it was in the days of the schoolmen, or even from what it was fifty years ago.¹ That a man cannot be, in the same week, in Rome and in London, was not long since an irrebuttable presumption; it is no presumption at all at present. That information cannot be passed instantaneously from one business centre to another was, in the twelfth century, irrebuttably presumed; in the nineteenth century most of our important contracts are based on telegrams. That the human voice cannot be heard a mile off, so as to distinguish words, might have been irrebuttably presumed ten years ago; at present, in all our great commercial marts, persons may converse by telephone at a distance of several miles. And under no conditions can a particular state of mind be irrebuttably assigned to any particular person. That an appropriate intent is assignable to an ideal man doing an ideal act may be speculatively true; that such an intent is to be assumed in advance of a trial cannot be practically accepted by courts having to do with real men, put on trial for acts, many of which were without motive (*e. g.* in issues of negligence), and many of which were done suddenly, in heedlessness, in passion, in self-defence, or through necessity. Hence it is that the old presumptions *juris et de jure* are gradually disappearing. This, indeed, is admitted by Mr. Best,² when he tells us that certain

Gradual
reduction
of irrebut-
table pre-
sumptions.

¹ See Mill's *Logic*, i. 389.

² Best's *Ev.* § 307.

presumptions, which in earlier times were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *praesumptiones juris tantum*, or considered as presumptions of fact to be made at the discretion of a jury.¹ The consequence is that our courts, even while holding to the old phraseology, are so far contracting the range of presumptions *juris et de jure* that while the class is still said to exist, no perfect individuals of the class can be found. The unimpeachability of records is one of the last survivors of these presumptions, and the unimpeachability of records is still spoken of as a presumption *juris et de jure*; but whatever may be the name given to this presumption, it vanishes when it is confronted by proof of fraud or oppression.²

§ 712. While in our own law *praesumptiones juris et de jure* preserve an existence which is now merely titular, in the modern Roman law the modern Roman law, as taught by its most authoritative commentators, even this titular recognition is refused. The scholastic *praesumptiones juris et de jure*, it is held by the best French and German commentators on this particular topic,³ are resolvable into the following classes:—

1. Conclusions from natural laws, the disproof of which is impossible.

2. Processual rules, enacted to facilitate litigation that in the long run is just, or to check litigation that in the long run is vexatious.

3. Fictions, which, though false, are assumed by the policy of the law.

4. Statutory presumptions, such as those introduced, by way of limitation, to quiet titles, or (as in the case of the statute of frauds) to exclude inferior and unreliable proof.

§ 713. The modification just noticed, of the old classification of presumptions, avoids what is evil in that classification and retains what is good. By getting rid of the term irrebuttable presumptions we not only remove a

¹ He cites to this Ph. & Am. Ev. 460; 1 Ph. Ev. 10th ed.

² Supra, § 595. See Whart. on Ev. § 790.

³ See Endemann's Beweislehre, 85—

94; Burckhard, Civilistische Praesumptionen, 369 *et seq.*; 11 Vierteljahrsschrift für Gesetzgebung, 601; Bonnier, Traité des Preuves, ii. 387—414 *et seq.* Supra, notes to § 708.

series of presumptions, really rebuttable, from a category to which they do not belong, but we relieve the practical administration of justice from the embarrassments which are produced by judges applying, in their charges to juries, the term irrebuttable to presumptions which are open to disproof.¹ On the other hand, we retain, restoring them to their proper place, those leading axioms of law (*e. g.* the postulates that all persons are cognizant of the law to which they are subject, and that all sane persons are responsible for their acts) which were once called presumptions *juris et de jure*, but which are really among the necessary principles from which jurisprudence starts.

§ 714. Dropping, therefore, the term *praesumptiones juris et de jure*, as unnecessary as well as unphilosophical, we proceed to discuss, as the subject of the present chapter, presumptions of law, in their general sense, and presumptions of fact. Our first duty will be to inquire in what these presumptions differ. And on examination, the points of difference will be found to be as follows: —

1. A presumption of law derives its force from *jurisprudence* as distinguished from *logic*. A statute, for instance, may say, that a mother who conceals the death of her bastard child is to be presumed to have been concerned in its destruction. This is a presumption of law, and is arbitrarily to be applied wherever such concealment is proved. If there be no such statute, then logic, acting inductively, will have to establish a conclusion to be drawn from all the circumstances of the particular case. Or a statute may prescribe that all persons wearing concealed weapons are to be presumed to wear them with an evil intent. This would be a presumption of law, with which logic would have nothing to do. On the other hand, whether a particular person, who carries a concealed weapon, there being no statute, does so with an evil intent, is a question of logic (*i. e.* probable reasoning, acting on all the circumstances of the case) with which technical jurisprudence has no concern. It is not necessary, however, to a presumption of law, that it should be established by statute, in our popular sense of that term. Statute, in its broad sense, includes juridical maxims established by the courts as well as juridical

Presump-
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law distin-
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from pre-
sumptions
of fact.

¹ See Whart. Cr. Pl. & Pr. § 794.

maxims established by the legislature. The prominent maxims of this kind are the presumptions of innocence, of knowledge of the law, and of sanity. Presumptions of law, therefore, are uniform and constant rules, applicable only generically. Presumptions of fact, on the other hand, are conclusions drawn by free logic, applicable only specifically.¹

2. To a presumption of law probability is not necessary; but probability is necessary to a presumption of fact. Nothing, for instance, can be more improbable than that all law-breakers know the law which they break; yet there is no person to whom this presumption is not applied. Nor is there even a faint probability that all the persons in prison at a particular time are innocent; yet, no matter how overpowering may have been the evidence adduced against him, there is no one of them who is not presumed to be innocent when he goes to his trial. On the other hand, without probability, there can be no presumption of fact. A man is not presumed to have intended an act, for instance, unless it is probable he intended it.

3. Presumptions of law relieve either provisionally or absolutely the party invoking them from producing evidence; presumptions of fact require the production of evidence as a preliminary. The presumption of innocence, for instance, makes it provisionally unnecessary for me to adduce evidence of my innocence. On the other hand, until I am proved to have done a thing, there can be no presumption against me of intent. Evidence, therefore, which is the necessary antecedent to presumptions of fact, is attached to presumptions of law only as a consequent. Presumptions of law stand at the gate of entrance, prescribing the terms on which evidence is to be received. Presumptions of fact stand at the gate of exit, determining the effect to be assigned to each fact which passes the ordeal of admissibility.

4. The conditions to which are attached presumptions of law are fixed and uniform; those which give rise to presumptions of fact are inconstant and fluctuating. For instance: all persons charged with crime are presumed to be innocent. Here the condition is fixed and uniform; it involves but a single, incomplex, unvarying feature, *charged with crime*; it is true as to all per-

¹ See *Hamilton v. People*, 29 Mich. 193.

sons embraced in the category. On the other hand, the presumption of fact, that *doing* involves *intending*, varies with each particular case, and there are no two cases which present the same features. Persons charged with crime may be sane or insane; may be adults or infants; may be at liberty or under coercion; in each case, so far as concerns the presumption of law, they are persons charged with crime, and the presumption applies equally to each. But whether a person doing an act is sane or insane; is an adult or an infant; is at liberty or under coercion; is essential in determining intent. Presumptions of fact, in other words, relate to unique conditions, peculiar to each case, incapable of exact reproduction in other cases; and a presumption of fact applicable to one case, therefore, is inapplicable, in the same force and intensity, to any other case. But a presumption of law relates to whole categories of cases, to each one of which it is uniformly applicable, in anticipation of the facts developed on trial. Thus it is a presumption of law that all persons are sane; and this presumption applies in advance, before any special facts are known to us, to all persons. But whether the defence of insanity is made out as to any particular person is an inference of fact, which we cannot safely determine until we have heard all the evidence admitted as bearing on the issue.

§ 715. Reference has been already made to the circumstance that the law-making power may attach to any particular fact or chain of facts certain legal consequences, and in this way turn a presumption of fact into a presumption of law. We may again recall, as illustrating this, the old English statutes, by which it was provided that concealment by a mother of the death of her bastard child is to be deemed proof that she was concerned in producing its unlawful death. By statutes, also, now existing in several States, it is prescribed that a person who has been absent without being heard from for a given period shall be presumed to be dead. And as an illustration of the converse process, by which presumptions of fact are, by the law-making power, cancelled, may be mentioned the legislation by which, in most of our States, the logical presumption of guilt arising from silence

Presump-
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when accused, is excluded from cases on trial where a defendant declines to testify in his own behalf.

§ 716. As is elsewhere more fully shown, much of the difficulty attending the consideration of this branch of evidence arises from the ambiguity of the terms employed.¹ It is a “presumption of law,” so we are told, that the sun will rise to-morrow; and this is true, if by “law” we mean “physical law.” It is a “presumption of law,” we are also told, that flight is prompted by fear; and this also is true, if we mean by “law,” “psychological law.” The mistake is that in one premise the term “law” is used in the sense of “physical” or “psychological law,” and in the other premise in the sense of “juridical law,” and thus an erroneous conclusion is reached. “All presumptions of law,” it is argued, “bind juries; that concealment argues consciousness of guilt is a presumption of law; therefore juries are bound to find that if there is concealment there is guilt.” Again, to take an illustration to be hereafter more fully expanded, we presume, as a mere matter of logical inference, that intelligent persons intend what they do. This, we may say, is in obedience to a “law;” and this is true if by “law” we mean “psychological law.” But the proposition is untrue if by “law” we mean “juridical law,” since there are multitudes of cases in which intelligent persons do things unintentionally.²

¹ Whart. on Ev. § 1239.

² “Unfortunately, however,” says Mr. Best (Ev. § 322), “the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, sometimes as one which it was obligatory on them to make,” &c. Best’s Ev. § 323, citing Phill. & Am. Ev. 460, 461; 1 Phill. Ev. 470, 10th ed. “When such language,” says Mr. Best, “is found in the judgments of

the superior courts, it is not surprising that the proceedings of inferior ones should exhibit even greater inaccuracy and confusion. Nothing, for instance, is more common than to hear a jury told from the bench, that when stolen property is found in the possession of a party shortly after a theft, *the law presumes him to be the thief*, — a direction both wrong and mischievous, — as calculated to convey to the minds of the jury the false impression, that when the possession of the stolen property has been traced to the accused, their discretionary functions are at an end. Our ablest judges tell juries in such cases that they ought, as men of common sense,

II. PSYCHOLOGICAL PRESUMPTIONS.

§ 717. Psychological presumptions are those which relate to the character and motives of men. They may be grouped in two general classes: (1.) Those of law, which the policy of the law attaches to all men generically; (2.) Those of fact, which our knowledge of human nature leads us to draw from a particular range of facts produced in a specific case. These presumptions will now be considered in order.

§ 718. Every man is presumed to be innocent until the contrary be proved, and if there be reasonable doubt as to his guilt, the jury are to give him the benefit of such doubt.¹ This is a presumption of law (*presumptio juris*), which the law makes arbitrarily in all cases, but which, unlike the *presumptiones juris et de jure*, may be rebutted by evidence. Between civil and criminal cases there is in this respect an important distinction: in the former, the jury weigh the testimony, and after striking a fair balance, decide accordingly; but in criminal cases, as we have had occasion to exhibit more fully in a prior chapter,² the testimony, in order to sustain a conviction, must be such as to satisfy the jury beyond a reasonable doubt that the prisoner is guilty of the charge alleged against him in the indictment.³

Of innocence. Defendant to have the benefit of reasonable doubt.

§ 719. A difficult question arises when the case of the prosecution is made out beyond reasonable doubt, and the defendant sets up matter of confession and avoidance. If there be a reasonable doubt as to the defence thus set up, is there to be an acquittal? Or must the defence, to avail, be sustained by a preponderance of proof? This

Presumption applicable to matters of defence.

to make the presumption, and act upon it, unless it be rebutted, either by the facts as they appear in the evidence for the prosecution, or by the evidence or explanation of the accused."

¹ See supra, §§ 1-15, for a full discussion of this topic.

² Supra, § 1.

³ As to burden of proof see supra,

§ 319. That burden is on prosecution to prove *corpus delicti*, supra, § 324.

That, in prosecutions for seduction, prior good character of the party seduced is presumed in cases where the statute does not make this a part of the case of the prosecution, see *Slocum v. People*, 90 Ill. 274. Compare supra, § 329.

topic is noticed in another chapter,¹ to which reference is now made.²

§ 719 *a*. The rule, it is to be remembered, so far as it requires guilt to be made out beyond reasonable doubt, is limited to the single issue of guilt when charged in a criminal trial. It does not obtain in civil issues, in which a party, the object being to obtain redress in the way of damages, may be found responsible for heinous crimes on a bare preponderance of proof.³ Nor does the rule apply to cases in which charges of crime come up collaterally on a criminal trial. A defendant, for instance, may impute contributory negligence to the prosecutor; and so far from it being requisite to this defence for such contributory negligence to be made out beyond reasonable doubt, it will be sufficient if there be such a case of contributory negligence proved as will throw reasonable doubt on the defendant's guilt. Or, on an indictment for homicide, the defendant sets up a killing by a third party. In this case, also, it is not necessary for the guilt of such third party to be made out beyond reasonable doubt. It is sufficient if there is such proof presented as will throw reasonable doubt on the defendant's guilt.

§ 720. But when a defence in itself purely extrinsic and independent is set up, all the allegations of the indictment being admitted, then, as we have seen, it is necessary that the defence should be sustained by a preponderance of proof. The principal defences of this class that have come before the courts are: (1.) License, or authority from the State; (2.) *Autrefois acquit* or *convict*; and (3.) Insanity, when the object is to obtain a verdict of lunacy.⁴ On the other hand, when this defence traverses any essential allegation of the indictment, then, when the whole evidence is in, the jury, as we have seen, are to be told that to convict it is necessary that such allegation should be established beyond reasonable doubt.⁵

¹ Supra, §§ 329-40.

² In Ohio, on a prosecution for abortion, in which, under the statute, it is a defence that the act was pronounced necessary by two physicians, it has been held that this defence, if set up by the defendant, must be affirma-

tively proved. *Moody v. State*, 17 Oh. St. 110.

³ Whart. on Ev. § 1245.

⁴ See supra, §§ 331-40.

⁵ Ibid. See *Chaffee v. U. S.* 18 Wall. 516; *Maher v. People*, 10 Mich. 262.

§ 721. When an offence charged in an indictment contains two degrees, malice being an ingredient of the major degree, but not of the minor, then if the offence be proved to have been committed by the defendant, but there is reasonable doubt as to the malice, the defendant is to be acquitted of the major offence and may be convicted of the minor.¹ If, in other words, on an indictment for an offence containing several grades, the jury have reasonable doubts as to the higher grade, they must acquit of the higher grade; and if they have reasonable doubts as to the lower grade, they must acquit of the lower grade. They can convict of no grade whatever, if they have reasonable doubt as to the defendant's guilt of such grade.²

If there be reasonable doubt as to major, defendant to be convicted of minor offence.

§ 722. No doubt it is sometimes said that from proof of a mere killing with a deadly instrument only murder in the second degree can be inferred.³ But, as is elsewhere shown, no such case as that of "A. killing B.

Inference to be from all the facts.

¹ Supra, §§ 1, 334; *Com. v. York*, 9 Met. 93; *Com. v. Drum*, 54 Penn. St. 9; *Staup v. Com.* 74 Penn. St. 458; *O'Mara v. Com.* 75 Penn. St. 424; *State v. Turner*, Wright, Ohio, 29; *Com. v. Hill*, 2 Grat. 594; *Willis v. Com. S. Ct. Va.* 1880; *State v. Walters*, 45 Iowa, 389; *State v. Laliyer*, 4 Minn. 368; *Milton v. State*, 6 Neb. 136; *Mitchell v. State*, 9 Yerg. 340; *Witt v. State*, 6 Cold. 5; *State v. Hildreth*, 9 Ired. 429; *Davis v. State*, 10 Ga. 101; *Daniel v. State*, 8 S. & M. 401; *State v. Holmes*, 54 Mo. 153; *State v. Gassert*, 65 Mo. 372; *State v. Evans*, 65 Mo. 574; *Hamby v. State*, 36 Tex. 523; *People v. Milgate*, 5 Cal. 127.

told the jury, that if, upon the whole circumstances of the case, they were satisfied of his (the prisoner's) guilt, they ought to find him guilty; but if their minds, taking all the evidence together, could not come to any satisfactory conclusion as to whether the act amounted to murder or manslaughter, they ought to find him guilty of manslaughter only." *State v. Coffee*, 3 Yerg. 283. See *Dove v. State*, 3 Heisk. 348.

The same rule applies where there is a reasonable doubt as to the specific intention to take life. In such case, there must be an acquittal of murder in the first degree; though, if a malicious homicide be proved, a conviction of murder in the second degree would, on the evidence, be sustained. See Whart. on Hom. §§ 34, 194; Whart. Crim. Law, 8th ed. § 392.

² See supra, § 1.

³ Infra, § 764. See *State v. Gassert*, 65 Mo. 352; *State v. Evans*, 65 Mo. 574.

Thus where, in Tennessee, the trial court ruled that when the fact of homicide was made out, and evidence produced in mitigation led the jury to doubt whether the offence was murder or manslaughter, they were bound to find murder, the judgment was reversed, the Supreme Court holding: "The judge should have

with a deadly weapon," viewing it simply in this meagre outline, ever arose, or can arise, in a court of justice.¹ In the first place, we at least know what kind of instrument was used. Was it poison? Undoubtedly if the poisoning were malicious, we cannot withdraw the case from the category of murder in the first degree. But are not poisonous drugs frequently administered without malicious intent? Are not most medicines more or less poisonous? Hence if we say, "Whoever deliberately administers poison acts maliciously," we state an untruth. If we say, "Whoever maliciously administers poison acts maliciously," this is a *petitio principii*. But in practical jurisprudence we are presented with no such alternative. We generally know what kind of poison is administered. We almost always know whether it was administered openly or stealthily; and there is no case that comes up for trial in which there is not a group of other circumstances each adding a new qualifying power to the reasoning by which the case is to be ruled. So it is with all other modes of killing; and hence we must conclude that the question whether an abstract killing with a deadly weapon is murder in the first or murder in the second degree is one which does not belong to practical jurisprudence, and the presentation of which to a jury can only mislead. No case can arise in which there is not some distinctive incident capable of either strengthening or weakening the proof of malicious intent. When facts exist which are consistent only with the hypothesis of murder in the first degree, then murder in the first degree is to be inferred. When facts exist which are consistent only with the hypothesis of murder in the second degree, then murder in the second degree is to be inferred. And this is entirely consistent with the proposition just stated, that when there are doubts as to whether a case falls within a higher or a lower grade, the jury as a matter of law are to incline to the merciful side, and find for the lower grade.²

§ 723. That knowledge of the law, on the part of all persons charged with crime, is so far presumed that they cannot set up

¹ See *supra*, §§ 11–20; *infra*, § 738. Wingo, 66 Mo. 181. As to inference

² *Supra*, § 721. See Whart. Crim. Law, 8th ed. § 392; and see, as adopting the views of the text, *State v.* to be drawn from deadly weapon see *infra*, §§ 734–37, 764.

ignorance of the law as a defence, is an axiom of jurisprudence.¹ That the axiom contains an untruth is conceded. No man, in any community, knows the law either intensively or extensively; there is no thinker, no matter how profound, who has not left some depths unfathomed; no reader, no matter how omnivorous, who has not left some details untouched. To predicate that of the ignorant which cannot be predicated of the learned specialist is absurd;² but predicated it is both of ignorant and learned, so far as to establish the conclusion that no one is allowed to set up ignorance of law as an excuse for wrong.³ Were it otherwise, government would be trampled under foot. All that would be necessary to secure perfect irresponsibility would be to lapse into perfect ignorance. The more brutal becomes the criminal, the more completely will he be relieved from punishment for crime.

Law presumed to be known by all subjects.

¹ Whart. Crim. Law, 8th ed. § 84; 1 Hale, 42; *R. v. Price*, 3 P. & D. 421; *S. C.*, 11 A. & E. 727; *Middleton v. Croft*, Str. 1056; *R. v. Esop*, 7 C. & P. 456; *R. v. Good*, 1 C. & K. 185; *Stokes v. Salomons*, 9 Hare, 79; *R. v. Hoatson*, 2 C. & K. 777; *R. v. Bailey*, R. & R. 1; *Stockdale v. Hansard*, 9 A. & E. 131; *Barronet's case*, 1 E. & B. 1; P. & D. 51; *U. S. v. Learned*, 11 Int. Rev. Rep. 149; *The Ann*, 1 Gallis. 62; *U. S. v. Anthony*, 11 Blatch. 200; *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Com. v. Bagley*, 7 Pick. 279; *Hamilton v. People*, 57 Barb. 625; *State v. Hart*, 6 Jones (N. C.), 389; *McGuire v. State*, 7 Humph. 54; *Winehart v. State*, 6 Ind. 30; *Black v. Ward*, 27 Mich. 191; *Whitton v. State*, 37 Miss. 379; *Chaplin v. State*, 7 Tex. Ap. 87.

² "Besides," objects Mr. Livingston, in his Report on the Louisiana Penal Code, "is it not a mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for the book that contained it, he would smile at my

ignorance, and, pointing to about five hundred volumes on his shelves, would tell me those contained a small part of it; that the rest was either unwritten, or might be found in books that were in London or New York, or that it was shut up in the breasts of the judges at Westminster Hall. If I should ask him to examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted. Your law, therefore, I repeat, is absurd in its consequences if taken literally, and mocks us by a reference to an inaccessible source for an explanation of its obscurities."

See also *Martindale v. Faulkner*, 2 C. B. 720, Maule, J.; *R. v. Mayor of Tewksbury*, L. R. 3 Q. B. 629; *Cutter v. State*, 36 N. J. L. 125. See Whart. on Ev. § 1029.

³ Knowledge, however, is not presumed of an unpublished statute. Whart. Crim. Law, 8th ed. § 86.

§ 724. The knowledge of law, however, which is here assumed is practical knowledge commensurate with the duties whose non-discharge the law, in the concrete case, condemns. . A sane person who commits a wrong, for instance, is bound to know that the wrong is subject to penal consequences ; if it is *malum in se*, his natural consciousness points to this, and it would be fatal to government to allow want of such natural consciousness to be a defence ; if it is *malum prohibitum*, it should be known by him, for it is his duty, when he undertakes to abide in a community, to know what it prohibits, for otherwise no police laws could be enforced. It is different when we undertake to determine the motives impelling a party to an illegal act. Hence ignorance of law may be proved, when on indictments for malicious offences such ignorance goes to negative malice,¹ as where a police officer honestly mistaking the law under which he acts, intentionally, but without warrant or authority, kills an escaped convict, in which case there could be a conviction for manslaughter, but not for murder. To larceny, also, it may be a defence that the defendant acted under an honest though erroneous belief that he had title.² But except in such cases, when the object is to determine the particular intent of the defendant when doing the act charged, ignorance of the law is no excuse. And even in cases of this class, the defendant, when the indictment permits it, may be convicted of a minor grade of the offence of which negligence is the *gravamen*. He ought to have known better, and though he cannot, to recur to homicide as an illustration, be convicted of murder, he may, on account of his negligence, be convicted of manslaughter.³

§ 725. That a person knows what he does is also sometimes called a presumption of law. If we take presumption of law to mean something that the law declares to be universally true until rebutted, then it is not a presumption of law that all persons know what they are about ; for there are many persons (*e. g.* persons influenced by fraud or coercion) of whom the law declares just the contrary. But that a person who is *capax negotii* should set up ignorance of fact as ground of exculpation or of defence would be against

¹ See *R. v. Reed*, C. & M. 306 ;
Whart. Crim. Law, 8th ed. § 85 a.

² Whart. Crim. Law, 8th ed. § 848.

³ Ibid. §§ 329 *et seq.*

the policy of the law; and hence, where there is no fraud or coercion, the law treats him as if he were cognizant of what he did. He is not supposed to have known facts of which it appears he was ignorant; but if his ignorance is negligent or culpable, or if the offence is one made by statute indictable irrespective of the perpetrator's intention at the time, then his ignorance is no defence. Hence ignorance of fact, while it may be admissible to disprove malice (*e. g.* when a person assaults another erroneously believing the latter to be a burglar),¹ is not a defence to an indictment under a statute making the person doing a particular act indictable irrespective of his intention;² or to an indictment for misconduct, when the fact of which the party charged was ignorant was one which he ought to have known.³

§ 726. All other things being equal, we are to presume, when a person is found dead, that he did not die by his own hand.⁴ Yet this presumption yields at once to any in-
Love of
life pre-
sumed.
 ferences to be drawn from the facts of the particular case.⁵

¹ *R. v. Levett*, Cro. Car. 538; *R. v. Reed*, C. & M. 306; *R. v. Sleep*, 8 Cox C. C. 472; *The Mariana Flora*, 11 Wheat. 11; *Yates v. People*, 32 N. Y. 509; *Com. v. Logue*, 38 Penn. St. 265. See Whart. Crim. Law, 8th ed. § 88.

² Sedgwick on Stat. Law, 2d ed. p. 84; *R. v. Gibbons*, 12 Cox C. C. 237; *R. v. Hicklin*, L. R. 3 Q. B. 360; *R. v. Smith*, 42 L. T. (N. S.) 160; *R. v. Prince*, L. R. 2 C. C. 154; *Hudson v. Rae*, 4 B. & S. 585; *Com. v. Mash*, 7 Met. (Mass.) 472; *Com. v. Thompson*, 11 Allen, 23; *Com. v. Emmons*, 98 Mass. 6; *Smith v. Brown*, 1 Wend. 231; *People v. Brooks*, 1 Denio, 457; *Morris v. People*, 3 Denio, 381; *Halsted v. State*, 41 N. J. L. 552; *aff. S. C.*, 39 N. J. L. 402; *State v. Hartfiel*, 24 Wis. 60; and other cases cited in Whart. Crim. Law, 8th ed. § 88.

³ *R. v. Robins*, 1 C. & K. 456; *R. v. Woodrow*, 15 M. & W. 404; *R. v.*

Ollifier, 10 Cox C. C. 402; *Com. v. Farren*, 9 Allen, 489; *Com. v. Vialle*, 2 Allen, 512; *Com. v. Nichols*, 10 Allen, 199; *Com. v. Waite*, 11 Allen, 264; *Com. v. Raymond*, 97 Mass. 567; *Com. v. Smith*, 103 Mass. 444; *Com. v. Wentworth*, 118 Mass. 441; *State v. Smith*, 10 R. L. 258; *Barnes v. State*, 19 Conn. 398; *People v. Zeiger*, 6 Parker C. R. 355; *People v. Reed*, 47 Barb. 235; *State v. Ruhl*, 8 Iowa, 444; *State v. Hanse*, 71 N. C. 518. See Whart. Crim. Law, 8th ed. § 88, where the cases are collected and discussed.

⁴ *Morrison v. R. R.* 63 N. Y. 643; *Continental Ins. Co. v. Delpauch*, 3 Weekly Notes, 277. See *Way v. R. R.* 40 Iowa, 341; *Guardian Co. v. Hogan*, 80 Ill. 135.

⁵ See Best's Evidence, §§ 346, 347; *Bigelow v. Benedict*, 70 N. Y. 561; *Greenwood v. Lowe*, 7 La. An. 197; *Richards v. Kountze*, 4 Neb. 200;

§ 727. Good faith in business has been frequently declared to be a rebuttable presumption of law. This postulate, however, must be regarded as an assumption merely

Bumpus v. Fisher, 21 Tex. 571. *Supra*, §§ 1 *et seq.*; *infra*, §§ 795-6.

"Men differ much in respect to the extent in which they will expose their lives. Men used to a wild career will take a chance at which those of quiet, secluded, cautious habits would shudder. To no two men can the same standard be applied; and, what is more, there are no two cases in which the dangers presented are precisely the same. Still more strikingly is this the case when we have to decide between suicide and homicide. Who knows the secret burdens of the life of a man whom we see stretched dead before us, drowned or poisoned, or shot in a way that may be extrinsically as imputable to his own hand as to the hand of another? Who knows what terrible crisis may have appeared to have been impending to that eye now glazed in death? Who knows what discoveries of crime may have been threatened? Who knows how morally overwhelming may have been the insolvency in which he was immersed? Sometimes these problems become so intricate as to defy for months the sagacity of the most patient and intelligent investigators, though their solution may have burst with the clearness and precision of lightning upon the vision of the dead man himself just before the fatal result. On the evening of February 22d, 1878, which, as Washington's birthday, was a sort of half holiday, Mr. Barron, the cashier of a bank in the village of Dexter, in Maine, was found dying in his office. He was gagged, and so faint as to be unable to explain his condition. No wounds sufficient to have caused death were

found on him; but there were symptoms which indicated that his condition might be traced to narcotic poison, as well as to the bruises on his person, and the compressions of the gag and cords by which he was bound. Whether this gag and these cords could have been self-imposed, and whether these wounds could have been self-inflicted, was a question about which medical experts differed. But what is still more strange, professional experts in accounting for some time differed as to whether there was really a deficit in the deceased cashier's accounts, and there was an equal confusion of testimony as to whether persons likely to have committed such a crime were lurking about the village on that particular day. Who can decide what weight the 'presumption of the love of life' is to have in this particular case? Who can decide whether life was not peculiarly hateful to the dying man—a man whose whole long career had been marked by what appeared to have been an honest pride in modest integrity? Who can tell what might have been the strange temptations which led him to his defalcation, if defalcation there was; and what might have been the agony and self-execration with which he awaited its disclosure? Or, if there had been no defalcation, who can tell what perturbations of intellect there may have been in his case to make him imagine, as some men have insanely imagined, that he was a defaulter when he was really not? These questions, in this and similar cases, can never be fully solved. How can we talk of a 'presumption' of love of life in such

for the determination of the burden of proof. In criminal issues, when bad faith is one of the ingredients of the offence, it must be proved beyond reasonable doubt.¹

§ 728. It has been sometimes said that when a document is shown to be genuine, the law presumes that it is true. But genuineness and truthfulness are so far from being convertible, that documents prepared to effect any political, social, or ecclesiastical end, are from their nature *ex parte*, and are only to be received subject to such qualifications as may be supplied by a knowledge of the character and aims of their authors. It is true that if we could conceive of an ideal genuine document without any distinctive differentia of its own, we might speak of an ideal presumption of law that such a document is true. But there is no ideal genuine document; as soon as genuineness is established, it brings with it a series of incidents peculiar to itself, by which the inference of veracity is moulded. The documents, for instance, that may be published with regard to a homicide of one of the parties to a contested election may be all genuine, but we cannot determine as to the truth of any one of them without first taking into account the prejudices of its author, and the objects he may have had in view in making the publication, and then proceeding to compare it with whatever other relevant evidence we can collect. The Roman authorities on this point speak unhesitatingly. Truth and genuineness, they insist, are not equivalent, though genuineness or falsification affords inferences of truth or falsehood. But this conclusion is a *praesumptio hominis*, or logical

Genuine-
ness as
presump-
tion of
truth.

cases, when the question depends upon the figuring up of a column of accounts, or the truth of a contested entry? How can we advance such a presumption seriously in cases in which a man, absorbed in a family of helpless children, whom he knows he cannot relieve by living, determines to relieve them by dying, and, after insuring his life, takes poison and dies? Is not the real question here whether there were circumstances which indicated an intention to kill himself by the poison, and on these cir-

cumstances can we do otherwise than say that this 'presumption,' or more properly inference, depends? In other words, must we not arrive at the conclusion that here, as in other cases, there is no such thing as a presumption of law, but that the inference is one of logic, based upon a comparison of facts, and varying in force with each particular collocation of circumstances?" 1 Crim. Law Mag. (Jan. 1880) 25-6.

¹ Supra, § 330. As to relevancy in such cases see supra, §§ 55-7.

conclusion, as distinguished from a *praesumptio legis*, or arbitrary legal conclusion.¹

§ 729. All persons who have reached years of discretion are regarded *prima facie*, by a rebuttable presumption of law (*presumptio juris*), to be sane.² Hence the burden of proof, when a party sets up insanity as a defence, is on him to prove it.³ In what way this burden is to be sustained is elsewhere discussed.⁴

§ 730. It has frequently been said to be a presumption of law that chronic insanity is continuous;⁵ but that such presumption does not exist as to fitful and exceptional attacks.⁶ This, however, is a mere *petitio principii*; it being tantamount to saying that chronic insanity is chronic, and transient insanity is transient. The presumption as to the continuance of insanity, such is the more correct statement, is one of fact, varying with the particular case.⁷ And it resolves

¹ See *Quinct. v. 5*; L. 4. D. xxii. 4; L. 26. § 2. D. xvi. 3; *Endemann*, 258. As to distinction between genuineness and authenticity see *Paley's Evidences*, Introd. Chap. As to proof of genuineness see *supra*, §§ 546 *et seq.*

² *R. v. Stokes*, 3 C. & K. 188; *R. v. Taylor*, 4 Cox C. C. 155; *R. v. Layton*, 4 Cox C. C. 149; *U. S. v. Lawrence*, 4 Cranch C. C. 544; *U. S. v. McGlue*, 1 Curtis, 1; *State v. Lawrence*, 57 Me. 574; *Com. v. Eddy*, 7 Gray, 583; *State v. Spencer*, 1 Zab. 202; *Lynch v. Com.* 77 Penn. St. 205; *Boswell v. Com.* 20 Grat. 860; *State v. Brandon*, 8 Jones (N. C.), 463; *Weed v. Ins. Co.* 70 N. C. 566; *State v. Starke*, 1 Strobb. 479; *Loeffner v. State*, 10 Oh. St. 599; *People v. Myers*, 20 Cal. 518. As to burden in case of insanity see *supra*, § 336.

³ See *supra*, § 336.

⁴ *Ibid.*

⁵ *R. v. Layton*, 4 Cox C. C. 149; *R. v. Stokes*, 3 C. & K. 188; *Cartwright v. Cartwright*, 1 Phillimore, 100; *Atty. Gen. v. Parnter*, 3 Bro. C. C. 441;

White v. Wilson, 13 Ves. 88; *Prinsop v. Dyce Sombre*, 10 Moo. P. C. 232; *Nichols v. Binns*, 1 Sw. & Tr. 243; *Smith v. Tebbitt*, L. R. 1 P. & D. 398; *Hoge v. Fisher*, 1 P. C. C. R. 163; *Breed v. Pratt*, 18 Pick. 115; *Hix v. Whittemore*, 4 Met. 545; *Sprague v. Duel*, 1 Clarke (N. Y.), 90; *Titlow v. Titlow*, 54 Penn. St. 216; *State v. Spencer*, 1 Zab. 196; *Carpenter v. Carpenter*, 8 Bush, 283; *Ballew v. Clark*, 2 Ired. L. 23; *State v. Bringer*, 5 Ala. 244; *Saxon v. Whittaker*, 30 Ala. 237; *Ripley v. Babcock*, 13 Wis. 425; *State v. Reddick*, 7 Kans. 143.

⁶ *Hall v. Warren*, 9 Ves. 605; *White v. Wilson*, 13 Ves. 87; *Lewis v. Baird*, 3 McLean, 56; *Hix v. Whittemore*, 4 Met. 545; *State v. Reddick*, 7 Kans. 143; *People v. Francis*, 38 Cal. 183.

⁷ *R. v. Stokes*, 3 C. & K. 188; *R. v. Layton*, 4 Cox C. C. 149; *Sadler v. Sadler*, 3 C. B. (N. S.) 87; *Smith v. Tebbitt*, L. R. 1 P. & D. 434; *Anderson v. Gill*, 3 Macqueen S. A. Cas. 197; *Staples v. Wellington*, 58 Me. 453; *State v. Spencer*, 1 Zab. 196;

itself into the conclusion that when insanity of a permanent type is shown to have existed, without proof of recovery, the burden is on the party setting up sanity to prove it,¹ but that the mere fact that a party had years ago an attack of exceptional brain disease does not impose such a burden.

§ 731. An inquisition of lunacy is, as to strangers, at the most, only *prima facie* proof of business incompetency,² though it may conclude parties.³ Hearsay in the neighborhood is inadmissible to prove insanity.⁴ The issue of insanity is to be determined by the facts proved in the particular case, such as prior insane conduct;⁵ physical peculiarities;⁶ and hereditary tendency.⁷ In arriving at a conclusion, the opinions of persons who have observed the alleged lunatic, whether such persons be experts or non-experts, are to be considered.⁸

Insanity may be inferred from circumstances.

The burden of proof in such cases is more fully discussed in a prior chapter.⁹

§ 732. Another psychological law, in obedience to which it may be *prima facie* inferred that men will act, is that persons when advised of danger will take ordi-

Prudence in avoiding danger will be presumed.

State v. Starke, 1 Strobb. 479; State v. Bringer, 5 Ala. 244.

¹ State v. Wilner, 40 Wis. 304. See supra, § 68.

² See cases cited Whart. on Ev. § 1254.

³ Supra, § 599.

⁴ Wright v. Tatham, 1 A. & E. 313; 7 A. & E. 313; 4 Bing. N. C. 489; Lancaster Bk. v. Moore, 78 Penn. St. 407, overruling Rogers v. Walker, 6 Barr, 371; Choice v. State, 31 Ga. 424. Supra, § 599.

When the insanity of the defendant is relied on in defence to an indictment for murder, evidence of the defendant's subsequent acts or conduct is not admissible to prove the existence of that condition at the time of the offence, except when so connected with evidence of a previous state of mental disorder as to strengthen the

inference of its continuance at the time of the murder, or when they indicate unsoundness of so permanent a nature as necessarily to reach back beyond that time. Com. v. Pomeroy, 117 Mass. 148.

⁵ U. S. v. Sharp, 1 Pet. C. C. 118; Lake v. People, 1 Parker C. R. 495; McLean v. State, 16 Ala. 672; People v. March, 6 Cal. 543.

⁶ 1 Wh. & St. Med. Jur. § 470.

⁷ R. v. Tuckett, 1 Cox C. C. 103; R. v. Oxford, 9 C. & P. 525; Smith v. Kramer, 1 Am. Law Reg. 353; Baxter v. Abbott, 7 Gray, 71; Com. v. Andrews, cited 1 Wh. & St. Med. Jur. 375. See State v. Christmas, 6 Jones (N. C.), 471; Whart. Crim. Law, 8th ed. §§ 64-5.

⁸ Supra, §§ 417 *et seq.*

⁹ Supra, § 336.

nary care for self-preservation.¹ Thus it has been held in Pennsylvania,² that, in the absence of evidence to the contrary, a person who has been killed by a train, at a railway crossing, will be so far presumed to have observed the requisite precautions that the burden of proof is on the railway company to show the contrary.³ Presumptions of this class are simply inferences of fact, varying in intensity with the capacity of the subject. To an infant, but a slight degree of prudence is imputed; the degree imputed increases with years.⁴ Prudence is taught by experience, direct or indirect, and we cannot impute prudence in avoiding danger, except to those who know what danger is.⁵

§ 733. Where, in the commission of a crime, the husband and wife are present, and coöperating in the criminal act, it is a presumption of law, capable of being rebutted by proof, that the wife is acting under coercion.⁶ In the old practice in criminal cases, treason and murder were excepted from the operation of this presumption;⁷ but this exception is no longer admitted.⁸ In civil actions for torts the same *prima facie* presumption exists in the wife's favor; though this may be rebutted by proof that she instigated the tort, or by other

¹ As to relevancy of such evidence see *supra*, § 56.

² *Pennsylvania R. R. Co. v. Weber*, 76 Penn. St. 157.

³ Though see, *contra*, *Wilcox v. Rome, &c. R. R. Co.* 39 N. Y. 358. In *Weiss v. R. R.* 79 Penn. St. 387, the court said: "When the plaintiffs below closed their evidence, they had a perfect *prima facie* case to go to the jury. They had given evidence of the negligence of the defendants, and no contributory negligence of the deceased appeared. The presumption of law (?) was that he had done all that a prudent man would do under the circumstances to preserve his own life, and that he had stopped, and looked, and listened." See *Whitford v. Southbridge*, 119 Mass. 564.

⁴ See *Whart. on Negligence*, §§ 310, 315.

⁵ See *Bain on Character*, 282.

⁶ See 1 *Hale*, 45, 47; *R. v. Manning*, 2 C. & K. 887; *R. v. Smith*, 8 Cox C. C. 27; *R. v. Stapleton*, 1 *Craw. & Dix*, 163; *R. v. Matthews*, 1 *Den. C. C.* 596; *R. v. Cohen*, 11 Cox C. C. 99; *State v. Harvey*, 3 N. H. 65; *Com. v. Eagan*, 103 *Mass.* 71; *Quinlan v. People*, 6 *Parker C. R.* 9; *Uhl's case*, 6 *Grat.* 711; *Davis v. State*, 15 *Ohio*, 72; *Miller v. State*, 25 *Wis.* 384; *State v. Patterson*, 1 *Strobh.* 169; *Williamson v. State*, 16 *Ala.* 431.

⁷ *Whart. Crim. Law*, 8th ed. §§ 78 *et seq.*

⁸ *R. v. Smith*, 8 Cox C. C. 27; *R. v. Wardroper*, 8 Cox C. C. 284; *R. v. Manning*, 2 C. & K. 903; *Com. v. Gannon*, 97 *Mass.* 547; *Com. v. Welch*, *Ibid.* 598.

proof showing her independent and free concurrence.¹ The presumption does not apply to acts done in the husband's absence.²

§ 734. That a man intends the probable consequences of what he does is sometimes styled a presumption of law. This, ^{Probable conse-} however, is an error, if by presumption of law is meant ^{quences intended.} a presumption to be imposed by the courts as universally applicable. It is not universally true that a man intends the probable consequences of his act. A manufacturer of pistols, for instance, knows that it is probable that some of the pistols he makes may be used to kill; but the killing that results he does not in the eye of the law intend. Probable consequences, also, may result from acts as to which the law, by pronouncing them to be negligent, expressly negatives intent. We are unable, therefore, to say of all the probable consequences of acts that they were intended by the authors of such acts. All that we can say is, that most of such probable consequences were intended; and that, judging from analogy or imperfect induction,³ such is the case with the particular consequences we have to discuss. In this sense we may speak of such consequences as presumably intended.⁴ In all departments of jurisprudence this line of reasoning is applied. We infer that he who breaks into a house at night and steals goods therefrom intends burglary,⁵ and that he who publishes a libel does so intentionally, though the inference is open to rebuttal.⁶ We *infer*, in such and similar cases, intent; but we infer it (even when a party is examined as to his motives) from the facts of the particular case. The process is induction from facts, not deduction from arbitrary law.⁷

¹ *Marshall v. Oakes*, 51 Me. 308.

² 1 Hawk. c. 1, s. 9; 1 Hale, 47; *Martin v. Com.* 1 Mass. 347; *Com. v. Neal*, 10 Mass. 152; *Com. v. Butler*, 1 Allen, 4.

³ See *supra*, §§ 5-17.

⁴ *R. v. Brice*, R. & R. 450; *R. v. Cobden*, 3 F. & F. 833; *State v. Goodenow*, 65 Me. 30; *State v. Gilman*, 69 Me. 163; *Com. v. McGerty*, 114 Mass. 299; *Knapp v. White*, 23 Conn. 529; *Quinebaug Bk. v. Brewster*, 30 Conn. 559; *Thomas v. People*, 67 N. Y. 218;

Hackett v. Com. 15 Penn. St. 95; *Jones v. Ricketts*, 7 Md. 108; *Hart v. Roper*, 6 Ired. Eq. 349; *Hayes v. State*, 58 Ga. 35; *Gauldin v. Shehee*, 20 Ga. 531; *Mears v. Graham*, 8 Blackf. 144; *State v. Lautenschlager*, 22 Minn. 514. That such inference may be rebutted see *Filkins v. People*, 69 N. Y. 106.

⁵ *R. v. Brice*, *supra*.

⁶ *Pontifex v. Bignold*, 3 M. & Gr. 63.

⁷ An extraordinary illustration of

§ 735. But, as has already been noticed, these inferences, though inferences of fact, varying in intensity with each particular case (not *prima facie* invariable as is the presumption of innocence), are not inferences to be arbitrarily applied. The jury in such matters is to accept certain general principles of probable reasoning, which it is the duty of the court to announce, not as binding rules of law, but as logical processes, of great value in all questions of evidential induction.

§ 736. The presumption (or inference, as it may more properly be called) immediately before us, that the natural and probable consequences of every act deliberately done were intended by its author,¹ may be copiously illustrated. Thus on a trial for forgery, where the forgery is proved, an intent to defraud the person who would have to pay the instrument if it were genuine may be inferred, even though the instrument be so framed as not to impose upon him, and the intent to defraud be general, and not confined, or in any way pointed to the person by whom, if genuine, the instrument would be paid.² So the uttering of a forged stock receipt to a person who employed the prisoner to purchase stock to that amount, and advanced the money, is the basis from which may be inferred an intent to defraud, notwithstanding the belief of the party to whom it was uttered that the prisoner had no such intent.³ Where a killing, also, is by a person without authority, and not in public war, by an instrument likely to cause death, with deliberate aim, malice is to be inferred from

the tendency to push unduly this kind of inference is to be found in *State v. Neely*, 74 N. C. 425. A negro, seeing a white woman passing alone through a piece of woods, gave chase to her, crying out to her several times to stop. She ran, until she was in sight of a dwelling-house, when the negro, not having overtaken her, retreated. This was held by a majority of the court sufficient to sustain a conviction for assault with intent to commit a rape.

¹ *R. v. Price*, 9 C. & P. 729; *R. v. Holt*, 7 C. & P. 518; *R. v. Dixon*, 3

M. & S. 15; *R. v. Bailey*, R. & R. 1; *R. v. Harvey*, 3 D. & R. 464; *Com. v. Drew*, 4 Mass. 391; *Com. v. Snelling*, 15 Pick. 337; *People v. Cotteral*, 18 Johns. 115; *State v. Cooper*, 1 Green (N. J.), 361; *State v. Mitchell*, 5 Ired. 350; *State v. Jarrott*, 1 Ired. 76; *State v. Council*, 1 Overt. 305.

² Whart. Crim. Law, 8th ed. §§ 717 *et seq.*; *R. v. Mazagora*, R. & R. 291; *Henderson v. State*, 14 Tex. 503; *Hoskins v. State*, 11 Ga. 92; *State v. Mix*, 15 Mo. 153.

³ *R. v. Sheppard*, R. & R. 169.

the act.¹ But the inference of intent, or of malice, is to be drawn from the whole case, varying in force as the case varies.² It is wrong to say in cases of homicide, for instance, that as a uniform presumption of law criminal intent and malice are to be presumed from the use of a deadly weapon, for there are cases where this is not true.³ Yet in cases where the evidence shows the deliberate use by an intelligent person of a deadly weapon, in a private encounter, without authority of law, the jury may be told that malice is a proper logical inference.⁴

§ 737. The Roman common law is to the same effect. *Facta laesione praesumitur dolus, donec probetur contrarium.* This is based partially on the Code and opinions of the jurists, partially on philosophical grounds. But this is simply a "conclusio probationum," or inference of probable inductive reasoning from facts. And with peculiar caution do the jurists insist upon the inference being drawn from all the circumstances of the case. It is, they tell us, a process of free logic, in which we are not justified in arriving at an inference until we weigh every fact put in evidence, and as to which no pre-announced inflexible rule can be declared.⁵

Roman law
to the same
effect.

§ 738. We must keep in mind that the doctrine that malice

¹ See *R. v. Ward*, L. R. 1 C. C. 473; *Murray v. State*, 1 Tex. Ap. 356; *Thomas v. People*, 67 N. Y. 417.

² *Meyers v. Com.* 83 Penn. St. 218; *State v. Zeibart*, 40 Iowa, 169; *State v. Lautenschlager*, 22 Minn. 514.

³ *Filkens v. State*, 69 N. Y. 101; *State v. Painter*, 67 Mo. 84.

⁴ *Infra*, § 764. See *R. v. Welsh*, 11 Cox C. C. 336; *R. v. Selten*, 11 Cox C. C. 674; *Murray v. Com.* 79 Penn. St. 311; *Kingen v. State*, 45 Ind. 519; *Buckner v. Com.* 14 Bush, 60; *Ferris v. Com.* 14 Bush, 362; *State v. Roane*, 2 Dev. 58; *State v. West*, 6 Jones (N. C.), 505; *State v. Coleman*, 6 Rich. (N. S.) 185; *Simpson v. State*, 59 Ala. 1; *State v. Swayse*, 30 La. An. 1323; *Palmore v. State*, 29 Ark. 248; *Skidmore v. State*, 43 Tex. 93; *Perry v. State*, 44 Tex.

⁴ *Infra*, § 764.

⁵ *Collat. legg. Mos. et Rom.* 1. 8. *Imperator Antoninus Augustus Aurelio Herculano et aliis militibus. Frater vester rectius fecerit, si se praesidi provinciae optulerit: cui si probaverit non occidendi animo hominem a se percussus esse, remissa, homicidii poena secundum disciplinam militarem sententiam proferet. L. 1. C. ad L. Corn. de sicar. (9. 16.); L. 5. C. de iniur. (9. 35.); L. 7. pr. D. de administ. tutor. (26. 7.); Gandinus Rub. de homicidiis n. 28. p. 350; Mascardus *Conclusiones probationum*, Concl. 532. n. 10 sqq.; Menochius *de praesumpt.* v. 3. n. 45 sqq.; Farinacius qu. 88. n. 12-24. qu. 89. n. 74 sqq.; Matthaeus *de crim.* xlvii. 4. 1. n. 10.*

and intent are presumptions of law, to be presumed from the mere act of killing, belongs, even if correct, to purely speculative jurisprudence, and cannot be applied to any case that can possibly arise before the courts. As we have just seen, in no case can the prosecution limit its proof to the mere act of killing. If killing be proved, the mode must not merely be shown, but averred. It is not enough to aver in the indictment that "A. killed B." How the killing was done must be specified. Nor is it possible to eliminate from the proof the mode; for a statement by a witness, could we imagine such evidence to be offered, that "A. killed B.," would be inadmissible as matter of opinion; it would be necessary to state the facts, so as to show that the way of killing was one of which the law takes cognizance. It may be said, for instance, that A., a son, killed his mother by his misconduct breaking her heart; but this would not be the subject of a criminal prosecution. What the law punishes, is not *killing*, but *particular modes of killing*, and those must be averred and proved. Now these modes, when proved, form facts from which intent is to be inferred or negatived. It is therefore announcing a proposition purely speculative and irrelevant to tell a jury that an abstract killing involves, as a matter of law, an abstract intent. It is perfectly proper, however, to tell a jury that from certain circumstances, — *e. g.* a deadly weapon, repeated and severe wounds, threats, — intent and malice may be rightly inferred as inferences of fact. These are inferences familiar in the operation of psychological and social law; inferences the jury are bound to weigh; but in weighing which it is proper that they should be advised by the court. When we apply this test, the apparent conflict of opinions vanishes. It is true that we hear occasional utterances, as in Massachusetts, of the old doctrine, that malice is to be inferred from the mere act of killing; but wherever this is done, it is followed by the admission that when the facts of killing are proved, then the malice is to be inferred from the facts. Now as the facts of killing are always proved, the idea of abstract malice being presumed from abstract killing has no application to the cases before the court.¹ It is a specu-

¹ See this virtually admitted in *Shaw, C. J.*, and by *Curtis, J.*, in *U. Com. v. Hawkins*, 3 Gray, 463, by *S. v. Armstrong*, 2 Curtis C. C. 446.

lation like the speculations of the old schoolmen, from which it is taken, based on the supposition that there are abstract generic phenomena (*e.g.* an abstract horse with abstract predicates); speculations which roam over all creation, without ever touching any particular real case. Should, however, the judge make the proposition not speculative but regulative, — should he direct the jury that logical inferences of this class are presumptions of law, and tell them to presume malice from the act of killing, — then this would be error.¹

§ 739. The fallacy which has just been noticed pervades the civil as well as the criminal side of our law. Thus we are told by an authoritative writer, that “The *deliberate* publication of a calumny, *which the publisher knows to be false*, raises, under the plea of ‘Not guilty’ to an action for libel, a conclusive presumption of malice.”² Now, here again is either a mere *petitio principii*, being equivalent to saying, “A falsehood uttered deliberately and knowingly is a falsehood uttered deliberately and knowingly,” or we have exhibited to us, not a “conclusive” but a probable presumption of malice. Undoubtedly the fact, that a document attacking the character of another is published by a mere volunteer, is ground from which malice may be inferred. But this fact is not always enough to make out malice, for when the publication is privileged, then, in order to show malice, facts inconsistent with *bona fides* must be proved.³ Whether there is malice, therefore, even by force of the very line of cases before us, is a question of fact, determined by the evidence in the particular case. Another illustration of the same error may be noticed in an English ruling, that fraud is to be inferred wherever one man tells an untruth to another

Nor from
other hurt-
ful act.

¹ Whart. Cr. Pl. & Pr. § 794. Of the inferences to be drawn from the instrument see *infra*, § 768.

² Taylor's Evidence, § 71, citing *Haire v. Wilson*, 9 B. & C. 643; *R. v. Shipley*, 4 Dougl. 73, 177; *Fisher v. Clement*, 10 B. & C. 475; *Baylis v. Lawrence*, 10 A. & E. 925.

³ *Bromage v. Prosser*, 4 B. & C. 247; *Spill v. Maule*, L. R. 4 Ex. 232; *Whitefield v. R. R.* 1 E., B. & E. 115; *Taylor v. Hawkins*, 16 Q. B. 308; *Cooke v. Wildes*, 5 E. & B. 328; *Too-good v. Spyring*, 1 C., M. & R. 181, 193; 4 Tyr. 582, S. C.; *Coxhead v. Richards*, 2 C. B. 569; *Wright v. Woodgate*, 2 C., M. & R. 573; Tyr. & Gr. 12, S. C.; *Gilpin v. Fowler*, 9 Exch. 615; *Somerville v. Hawkins*, 10 C. B. 588; *Harris v. Thompson*, 13 C. B. 338; *R. v. Wallace*, 3 Ir. L. R. (N. S.) 38.

for the purpose of obtaining the latter's goods.¹ Here, again, we have the same dilemma. Either the ruling, if it means that he who intends to cheat has the intention of cheating, is a bare *petitio principii*; or it rests on a false premise, namely, that a man who, by means of an untruth, obtains another's goods, intends to cheat, in teeth of the fact that there are innumerable cases in which untruths are uttered unconsciously, or as mere brag, or as matters of opinion, in which cases it is held that the intention to cheat is not proved. In this case, also, we have the process of deduction erroneously substituted for induction, by which alone, as we have seen, conclusions as to intent can be reached.

§ 740. When the proof indicates that there were other intentions beside that laid in the indictment (*e. g.* in stealing, beside the intention to steal, an intention to help a third person, or in homicide, beside the intent to kill, an intent to vindicate an impaired right), the existence of such cumulative intention is no defence.² There is no good act that is not to some extent impelled by improper motives; there is no bad act which the perpetrator does not summon up good motives to excuse. An assassination, for instance, is rarely for the exclusive purpose of satiating private hate. A bad man is to be removed from the world, or some good deeds are to be aided by part of the plunder. If whenever good intentions are mingled with the bad intention which stimulates the guilty act there can be no conviction, there could be no conviction in any case.

§ 741. From the vexed question of intent we proceed to another line of rulings, as to which variable logical inferences have been too often spoken of as constant presumptions of law. Where a document is shown to have been fraudulently altered, defaced, or destroyed, we may

¹ *Tapp v. Lee*, 3 B. & P. 371. See *Pontifex v. Bignold*, 3 M. & Gr. 63; *Com. v. Murphy*, 23 Grat. 960. In *R. v. Noon*, 6 Cox C. C. 137, Cresswell, J., told the jury that the law infers malice from a wilful killing without provocation. But this also is a *petitio principii*, and is nothing more than saying that a wilful killing is wilful.

² *R. v. Cox*, R. & R. 362; *R. v. Gillow*, 1 Mood. C. C. 185; *R. v. Davis*, 1 C. & P. 306; *R. v. Bowen*, C. & M. 149; *R. v. Hill*, 2 Mood. C. C. 30; *R. v. Batt*, 6 C. & P. 329; *State v. Moore*, 12 N. H. 42; *Com. v. McPike*, 3 Cush. 181; *People v. Curling*, 1 Johns. 320. See *supra*, § 135; and as to combination of intents see *Whart. Crim. Law*, 8th ed. § 119.

infer that this was done in the interests of the party to be benefited by the spoliation; and should he attempt to make use of the document in its corrupted state, or to offer parol evidence of its contents when it has been so destroyed, not only will he be precluded from taking advantage of his fraud, but among the several probable interpretations of the document, that which was most unfavorable to him will be adopted.¹ So a spoliation of papers by a neutral vessel when captured has been held to give a strong inference of hostile purpose.² And, as will soon be more fully seen, wherever evidence is intentionally suppressed, we have the right to suppose, as a matter of logic, that if produced it would tell against the party working the suppression.³

§ 742. Forgery of evidence, to adopt, with a slight change, Mr. Bentham's classification, may be effected: (1.) From a view of self-exculpation; (2.) Maliciously, with the intention of injuring the accused or others; (3.) In order to effect some speculative or moral end.⁴

Forgery of evidence for self-exculpation gives prejudicial inferences.

With a View to Self-exculpation. — A striking illustration of this is found in the trial of Dr. Webster, for the murder of Dr. Parkman, where letters were received by the police marshal of Boston, purporting to reveal the location of the body, which upon the trial were proved to have been written by the prisoner, in order to divert suspicion from himself, and to prevent a rigid examination of the premises where the murder was actually committed.⁵ The numerous fabrications of evidence in behalf of the claimant in the Tichborne case also had much influence in leading to the conclusion of his guilt. The same remarks apply to a forged defence of *alibi*. It is not an uncommon artifice to endeavor to give coherence and effect to a fabricated *alibi*, by assigning the events of another day to that on which the offence was committed, so that the events, being true in themselves, are necessarily consistent with each other, and false only in their assignment to the day in question.⁶ And while an *alibi* is

¹ *Infra*, § 749.

² *The Hunter*, 1 Dods. Adm. 480; *The Pizarro*, 2 Wheat. 227.

³ *Infra*, § 748; Whart. on Ev. § 1264.

⁴ See, on this point, *Amos's Great Oyer*, &c. 267.

⁵ Bemis's Rep. of Webster case, 210. See, on same point, *Gardiner v. People*, 6 Parker C. R. 155; *Edmund's case*, 1 Wh. & St. Med. J. § 167.

⁶ *Wills on Circumstantial Ev.* 116. An illustration of this is given in 1

a defence which is a constant safeguard of innocence, it is peculiarly susceptible of being fabricated as a shelter for guilt.¹ It has hence been held that the getting up by the defendant of a fictitious *alibi* by false personation is admissible against him on trial,² though such a defence must not be treated as necessarily involving guilt.³ The same may be said of an attempt to corrupt witnesses.⁴

§ 743. The fact of a forgery of evidence having taken place is, therefore, simply a circumstance from which, in connection with others (proof of the *corpus delicti* being essential), guilt may be inferred.⁵ Taken by itself, such proof is not inconsistent with innocence, since an innocent though weak and timid man, sensible that appearances are against him, and not duly weighing the danger of his being detected in clandestine attempts to stifle proof, may naturally resort to this mode of averting danger.⁶ Mr. Bentham, in illustrating this point, refers to a story in the Arabian Nights, which may be thus amplified. A little hunchback is accidentally choked by

Crim. Law Mag. 8; 17 Alb. L. J. 40.
As to *alibi* see supra, § 333.

¹ See supra, § 333; infra, §§ 749-50.

² *State v. Williams*, 1 Williams (Vt.), 724; *Turner v. Com.* 86 Penn. St. 54; and cases cited supra, § 334.

³ *Toler v. State*, 16 Oh. St. 583; *State v. Brown*, 25 Iowa, 561.

⁴ *State v. Staples*, 47 N. H. 113. Infra, § 749.

⁵ *State v. Collins*, 20 Iowa, 86; *State v. Benner*, 64 Me. 267; *Walker v. State*, 49 Ala. 398.

On an ejectment involving large estates in Ireland, the question being whether the plaintiff was the legitimate son of Lord Altham, and therefore prior in right to the defendant, who was his brother, it was proved that the defendant had procured the plaintiff, when a boy, to be kidnapped and sent to America, and on his return, fifteen years afterwards, on occasion of an accidental homicide, had assisted in an unjust prosecution against him for murder; and it was

held that these circumstances created a violent presumption of the defendant's knowledge of title in the plaintiff; and the jury were directed that the suppresser and the destroyer were to be considered in the same light as the law considers a spoliator, as having destroyed the proper evidence; that against him, defective proof, so far as he had occasioned such defect, must be received, and everything presumed to make it effectual; and that if they thought the plaintiff had given probable evidence of his being the legitimate son of Lord Altham, the proof might be turned on the defendant, and they might expect satisfaction from him that his brother died without issue. *Craig on dem. of Annesley v. Earl of Anglesea*, 17 St. Tr. 1416; and see the *Tracy Peerage*, 10 Cl. & F. 154; *Clunnes v. Pezzy*, 1 Camp. 8; *Lawton v. Sweeny*, 8 Jur. 967; *Wills Circ. Ev.* 72.

⁶ See case given by Coke, 3d Inst. 104, p. 232, and remarks infra, § 749.

swallowing a fish bone. His host, to get rid of him, places him at the door of a neighboring chamber. The inhabitant of this chamber, opening the door and seeing this unwelcome incumbrance deposited there, gives the body a kick, and is shocked, on returning to the spot a few minutes after, to find the hunchback dead. To ward off suspicion from himself, he takes up the body and places it in front of a second chamber, where a similar scene is shortly afterwards enacted. Quite a number of operations of this kind are gone through with, each successive occupant endeavoring to shift, in this way, suspicion from himself on his neighbor. It may be questioned whether many innocent men over whom suspicion lowers would not do very much the same thing. A man of sagacity and courage would undoubtedly say, "This thing implicates me. I will confront the difficulty at once. I will court investigation, and settle the matter right off." But not every one charged with crime has at his command sagacity and courage. A. is found dead, apparently murdered; and B. and C. are charged with killing him. B., who is a man of weak character, is innocent of the murder; but thinks that if he succeeds in destroying all the proof of the *corpus delicti* his acquittal will be sure. He attempts this (*e. g.* attempts to burn up the dead body, or to make way with other indicatory proof of a violent homicide), and attempting it unsuccessfully, the attempt is a strong article of evidence against him. B., a shrewd villain, if he makes the attempt, makes it successfully.

§ 744. While, therefore, guilt may be inferred from the fabrication of a false defence, the inference is not arbitrary, but varies with the circumstances of the case. Good as well as bad causes have in this way been pressed. If a cause is to be condemned because its advocates have forged evidence in its support, Christianity would have to be condemned, for in behalf of Christianity innumerable writings have been forged. Given a true cause, a desperate assailant, and an advocate who believes the end justifies the means, and falsehood will be resorted to to prove the truth. In litigations in which high passions are excited the temptation to strain if not fabricate evidence becomes almost irresistible. Few cases of disputed succession or legitimacy, for instance, are tried, in which suspicious evidence is not introduced on both sides; and such is almost

Presump-
tion varies
with case.

always the case in criminal prosecutions in which warring social or political parties are enlisted. We must also remember that false defences of this kind may be the result of the interference of ill-advised counsel or friends.¹

§ 745. It may be that the object of such forgery was to injure a third person, either as a means of gratifying revenge or of protecting self. A common instance of this is where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with a view of exciting suspicion of larceny against him; and a suspicion of murder may be raised by secreting a bloody weapon in like manner.²

¹ In the days of Sir Elijah Impey, an English merchant in India was sued on a promissory note. "It is forged," said he to his attorney. "Never mind," was the reply, "we will make it all right." The client gave the attorney a list of witnesses who would prove the forgery, and went into court expecting to hear them called. To his surprise, his counsel, after the plaintiff's case was closed, pulled out a release. "But the release" — so the client afterwards objected to his attorney — "was never given to me; I never heard of it before." "That is true," was the reply, "but the shortest way was to meet the plaintiff on his own ground, so we forged the release." It is unfortunate that in our criminal courts there is a class of lawyers who are unscrupulous enough to seize upon any defence that is available, no matter how false they may know it to be. That there are witnesses also ready to swear to any defence, when they do not run the risk of prosecution for perjury, is illustrated by the hangers-on who can be counted upon to offer and to swear to straw bail. It would be unjust, therefore, to impute to the client that which may be the entire work of the counsel. We have no right to infer guilt, even if false testi-

mony is brought into court knowingly by counsel.

But we must remember that there are many cases in which such testimony may come in without the complicity of either client or counsel. We have already noticed instances in which perjury has been deemed, by the witness committing it, a point of honor. *Supra*, §§ 373 *et seq.* Lord Cockburn, in his *Reminiscences*, notices several trials in which high-minded Scotch lords, who would scorn an untruth themselves, looked upon it as a matter of course that their retainers should come into court to swear to whatever might help their chief. But in many cases where false testimony is rendered, even this extent of connivance cannot be imputed. A man is to be tried on a capital crime. It is natural to suppose that among those whose being is wrapped up in his there may be some one ready to sacrifice himself, if it need be, for the rescue; some one like the Scotch servant, who would "rather trust his soul to God than his master to the Whigs." Yet this may be without any complicity on the part of the person on trial. 1 *Crim. Law Mag.* 17.

² *Best's Theory of Pres. Proof App.* Case 10, p. 102.

§ 746. Forgery of this kind may be forcibly accomplished. This Mr. Bentham illustrates by a case where three men unite in a conspiracy against an innocent person ; one laying hold of his hands, another putting into his

Such
forgery
may be
forcible.

Mr. Bentham gives the following : “ An old widow, reputed to have a large sum of money by her, lived in a small shop facing a street, with a back chamber, which served as her bedroom. Her entire family consisted of herself and a man-servant, who slept on the fourth story of the same house, but whose room had no communication with those of his mistress, except through the door of the front shop, which it was his usual practice to lock outside when going away at night, and take the key to his own room. One morning this door was observed open, but without any marks of violence or breaking upon it, and the old woman was discovered lying on her bed murdered, apparently by a bloody knife, which was found on the floor at some distance from her, while the strong box in the room was open, and had been rifled. One hand of the corpse grasped a quantity of hair, ascertained by comparison to be that of the servant, and the other a cravat, which turned out to be his property ; while the key of the shop was found in its usual place. On the strength of these presumptions of his being the murderer of his mistress, the unfortunate man was put to the torture, confessed the crime, and was broken on the wheel. In the process of time, however, it was discovered that the murder and robbery had been committed by a man who was the servant’s favorite companion, who, in order to avert suspicion from himself and cast it on his friend, had furnished himself with a knife and cravat belonging to him. He also availed himself of an opportunity to take a

wax impression of the shop key ; and as he was in the habit of dressing the servant’s hair, had saved from time to time a considerable portion of the combings, which, after perpetrating the murder, he placed, together with the cravat, in the hands of the deceased.” 3 Benth. Jud. Ev. 255. Of a like character was a case which occurred a few years ago in Mississippi. A young man named Boynton had been for some days staying at the house of a friend on a plantation on the Mississippi River. One morning the deceased, the master of the house, was found murdered in a rice brake ; by his side were seen Boynton’s pistols, and in Boynton’s hat, in the room where he was then sleeping, was found a paper which was known to have been a short time before in the pocket of the deceased. On this evidence Boynton was convicted and executed ; persisting to the end in his ignorance of the perpetrator of the act, and breaking wildly from the sheriff when the hour of execution arrived, proclaiming his innocence with an earnestness that shook the confidence of the by-standers in his guilt. Not many months after, a man, who had been prowling about the neighborhood at the time, was arrested, tried, and sentenced in another State for a murder subsequently occurring ; and when at the gallows he confessed that he had been the perpetrator of the murder for which Boynton had suffered ; that he had taken the pistols from Boynton’s pillow, and had in return placed a paper from the dead man’s pocket in Boynton’s hat.

To the same point is a trial related

pocket an article of stolen property, which the third, running up, as if by accident, during the scuffle, finds there, and denounces him to justice as a thief.¹

by Mr. Bentham, where the officers of justice were accused of having altered a common key, found in the possession of the defendant, into a master key, in order to make it appear at the trial that he had a facility for committing the murder which he really did not possess. § Benth. Jud. Ev. 60.

In another case, cited to the same effect, Thomas Harris, an innkeeper, was convicted in England, in 1642, of the murder of James Gray, a lodger. A servant of the prisoner, named Morgan, testified that he saw his master strangle the deceased; but the charge being denied, and no marks of violence appearing upon the body, the prisoner was upon the point of being discharged, when the maid-servant having desired to be sworn, testified that the prisoner had hidden a large sum of gold belonging to the deceased in the garden. This being found, and the prisoner's explanations being considered unsatisfactory, the jury found a verdict of guilty, and Harris was executed. It afterwards appeared that Gray had died a natural death; that Morgan having had a quarrel with his master took the opportunity of charging him with the murder; that Harris being an avaricious man had, from time to time previously, hidden sums of money in the garden, which being known to Morgan and the maid-servant, they had resolved to secure it when it should amount to a sum of sufficient magnitude; but that upon the trial, finding Morgan unsuccessful in his charge, the maid had resolved to sacrifice the money and her master to save her lover from the punishment of perjury, and had

accordingly testified to its whereabouts. *Celebrated Trials*, 591.

¹ § Benth. Jud. Ev. 39.

Another common circumstance of this kind, Mr. Bentham adds, is the pretence of having taken part of the draught from which death has ensued. *R. v. Wescombe*, *Annual Register* for 1829, p. 142. So, it is not unusual to endeavor to induce the suspicion of suicide, by placing some instrument of destruction in the hand of the murdered party. In the year 1764, a citizen of Liege was found shot, and his own pistol was discovered lying near him; from which circumstance, together with that of no person having been seen to enter or leave the house of the deceased, it was concluded that he had destroyed himself; but upon examining the ball by which he had been killed, it was found to be too large ever to have entered that pistol, and the real murderers were ultimately discovered. *Medical Jurisprudence*, by Paris & Fonblanque, vol. iii. p. 34. Green, Berry, and Hill were tried in the year 1678, for the murder of Sir Edmundbury Godfrey, who was strangled by a handkerchief, in Somerset House, on a Saturday night; and after remaining concealed until the following Wednesday, he was carried at midnight into the fields beyond Soho, and thrown into a ditch, and his own sword thrust through his body, in order to excite a belief that he had committed suicide. *State Trials*, vol. vii. p. 159. But in cases of this kind consistency is often overlooked, as by placing the weapon in the left hand, an instance of which took place in Fitler's case, cited in *Annual Register*

§ 747. Fabrication of evidence may also be for the mere purpose of creating a sensation in the community. In the summer of 1879, a lady in New York was found brutally murdered in her chamber, and though for a few days no definite traces of the murderer could be found, the guilt was finally brought home to a colored man named Chastine Cox, who was subsequently convicted. But while the question was still in suspense, public interest was much roused; and a series of letters appeared in the newspapers suggesting various persons as guilty of the murder, and two witnesses were ready to testify to facts grossly exaggerated, if not fabricated, implicating the husband of the murdered woman. Were these speculations and fabrications the work of a person seeking in this way to divert attention from himself? So far from this being the case, the speculations were thrown out as guesses, something in the way in which answers to conundrums are published; and nothing would better illustrate the falsity, as an absolute rule, of the presumption now before us, than the severity with which the prosecuting authorities would have rebuked an attempt to impute the homicide to the author of one of these communications on the ground that throwing the police on a false track is a presumption of guilt on the part of those by whom the luring device was designed. So far as concerns those who concocted fabrications implicating the husband of the murdered woman, we have here simply illustrated the fact that there may be gratuitous and volunteer perjuries for a prosecution, as well as gratuitous and volunteer perjuries for a defence. In the same line may be mentioned letters containing false statements, but designed innocently for the purpose of diverting a friend from a dangerous enterprise. Mr. Bentham gives, as an analogous illustration, the incident related of the patriarch Joseph, who, with the view of creating alarm and remorse in the minds of his guilty brothers, caused a silver cup to be privately hid in one of their sacks, and after they had gone some distance on their journey, had them arrested as thieves and brought back. The object of suppressing evidence, also, may be to protect, not self, but another person.¹

for 1834, p. 115; Wills Circum. Ev. 112.

¹ It is related of a dissolute English statesman, then in political disgrace,

§ 748. "The suppression or destruction of pertinent evidence," it is remarked by Mr. Starkie, "is always a prejudicial circumstance of great weight; for as no act of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were adduced, would operate unfavorably to the party in whose power it is."¹ One of the most prejudicial facts in the trial of Captain Donnellan was that he had rinsed the phials from which Sir Theodosius Boughton had taken the draught which was alleged to have caused his death. And in another conspicuous English case of poisoning, the contents of the stomach of the deceased, which had been placed in a jug for examination, were clandestinely thrown by the defendant into a vessel containing a quantity of water. The defendant was acquitted on the ground of the insufficiency of the evidence of the *corpus delicti*; but besides the tampering with the contents of the stomach, evidence was given

that being visited by a person evidently disguised, there was a suspicion among the police that this visitor was a foreign emissary, whom it was treason to harbor. A search-warrant was issued, and the house was entered. Its master, when he faced the officers, was in obvious confusion. He begged that at least his own chamber should not be searched, and he did this with a distressed earnestness which convinced them that in that chamber they would find the person of whom they were in search. Of course this made them more eager, and they forced their way into the room. A person was there in bed. "I will show you enough to prove to you that this is not the man you seek," said Lord Bolingbroke, for it was his house that was entered. He uncovered enough of the body to show that it was that of a woman, keeping the head concealed so that she might not be identified. His anxiety and confusion when his house was entered sprang from his desire to protect him-

self and his paramour from detection in a disgraceful intrigue.

¹ Starkie's Evidence, vol. i. p. 437. To same effect see Edmund's case, 1 Wh. & St. Med. Jur. § 167; Leeds v. Cook, 4 Esp. 256; Gray v. Haig, 20 Beav. 219; Moriarty v. R. R. L. R. 5 Q. B. 314; Curlewis v. Cerfield, 1 Q. B. 814; Owen v. Slack, 2 Sim. & St. 606; Bell v. Frankis, 4 M. & Gr. 446; Sutton v. Davenport, 27 L. J. C. P. 54; State v. Knapp, 45 N. H. 148; Thayer v. Stearns, 1 Pick. 109; Com. v. Webster, 5 Cush. 316; Grimes v. Kimball, 3 Allen, 518; Joannes v. Bennett, 5 Allen, 169; People v. Rathbun, 21 Wend. 509; Meyer v. Barker, 6 Binn. 228; Reed v. Dickey, 1 Watts, 152; Page v. Stevens, 23 Mich. 357; People v. Marion, 29 Mich. 31; Jones v. State, 64 Ind. 400; Winchell v. Edwards, 57 Ill. 41; Revel v. State, 26 Ga. 275; Blevins v. Pope, 7 Ala. 371; Bell v. Hearne, 10 La. An. 515; Lucas v. Brooks, 23 La. An. 117. See, however, remarks in Baker v. Ray, 2 Russell, 73. As to spiriting away witnesses see infra, § 749.

of other suspicious facts and declarations, strongly indicative of conscious guilt.¹

Filing away the engraving from articles of plate; cutting out the marks on linen; shoeing a horse backwards, as was the case in a remarkable arson case in New Jersey, so as to reverse the track; and the removal, or endeavor to remove from the person or clothes stains of blood, or other marks, together with other instances of obliteration or distorting of marks of identity, may be enumerated under this head. So having a large quantity of counterfeit coin in possession, many of each sort being of the same date and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole hid in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit and intended to utter it.²

In the great number of poison cases so industriously collected by Hitzig,³ there are several in which it was attempted, by the premature interment of human remains, to conceal the offence, the pretext being that this was rendered necessary by the state of the body. In one case, the presumption arising from a hurried burial was sought to be rebutted by the antedating the time of death, and an ingenious but perilous net-work of letter and funeral notices was spread while the deceased was still in full health. He stumbled unawares upon his own funeral paraphernalia, and was fortunately able, not only to read the mourning notes, but to prevent their necessity. Dr. Hitzig gives in

¹ *R. v. Donnall*, Wills Circum. Ev. 103.

In a case reported by Mr. Wills, as tried in 1836, before Mr. Justice Bosanquet, for stealing a quantity of rum which had been delivered to his master, a carrier by canal, for conveyance from Liverpool to Birmingham, the carrier's agent at Liverpool, as was his custom, had taken a sample of the spirit and tested its strength. Upon the delivery at its place of destination, the spirit was found to be under proof, and the portion abstracted had been replaced with water. The carrier's clerk, on the complaint of the con-

signee, went to the boat where the prisoner was to require explanation; but, as soon as he had stepped into it, the prisoner pushed him back upon the wharf, and forced the boat into the middle of the canal, where he broke the jars and emptied their contents, which by the smell were proved to be rum, into the canal. The prisoner was convicted. *R. v. Thomas*, Reported Wills Circum. Ev. 75.

² *R. v. Jarvis*, 33 Eng. L. & Eq. 567; *Dears. C. C.* 552; 7 *Cox C. C.* 53.

³ *Neue Pitaval*, von Dr. J. C. Hitzig und Dr. W. Haring.

full the trial of a woman who, under the pretext of a family custom, was enabled to direct no less than seven precipitate interments in her own immediate household, no one suspecting that the usage which she thus so rigorously followed was but a trick to cover the violent death of victims whom she appeared tenderly to lament.

§ 749. The holding back of evidence may be used as a presumption of fact against the party who holds back such evidence in all cases in which it could be produced.¹ When, on the refusal of a party to produce on trial papers which have been called for, the opposite party introduces parol evidence of the contents of the papers, then, if there be doubt, the probable interpretation most unfavorable to the suppressing party will be adopted.² The non-calling of a witness, however, will not justify an arbitrary presumption of suppression;³ unless such witness be important and be under the party's control;⁴ and under statute no presumption is to be drawn from the fact that a defendant does not offer himself for examination.⁵

Attempts to prevent a witness from attending are admissible as a fact from which unfavorable inferences may be legitimately drawn.⁶

Indicatory proof, however, may be destroyed by the inadvertent interference of third parties.⁷

¹ See cases cited *supra*, § 341; Abbott, C. J., in *R. v. Burdett*, 43 B. & Ald. 161; *Wentworth v. Lloyd*, 10 H. L. C. 589; *Durgin v. Danville*, 47 Vt. 95; *State v. Moon*, 41 Wis. 684.

"Lord Mansfield forcibly observed, in *Blatch v. Archer*, that 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' *Cowper*, 68, 65." *Graves, C. J., Wallace v. Harris*, 32 Mich. 394.

See *Armory v. Delamire*, 1 Str. 505; *R. v. Jarvis*, Dears. C. C. 552; 7 Cox C. C. 53; *Atty. Gen. v. Windsor*, 24 Beav. 679; *Shoenberger v.*

Hackman, 37 Penn. St. 87; *Mordecai v. Beal*, 8 Porter, 529.

² *Cooper v. Gibbons*, 3 Camp. 363; *Crisp v. Anderson*, 1 Stark. 35; *Hanson v. Eustace*, 2 How. 653; *Clifton v. U. S.* 4 How. 242; *Barber v. Lyon*, 22 Barb. 622; *Cross v. Bell*, 34 N. H. 83; *Life Ins. Co. v. Ins. Co.* 7 Wend. 31; *Shortz v. Unangst*, 3 W. & S. 45.

³ *Scovill v. Baldwin*, 27 Conn. 316.

⁴ *Williams v. Com. Sup. Ct. Penn.* 1880.

⁵ *Supra*, § 435.

⁶ *State v. Barron*, 37 Vt. 57; *State v. Staples*, 47 N. H. 113; *Adams v. People*, 16 N. Y. Sup. Ct. 89; *People v. Pitcher*, 15 Mich. 397.

⁷ *Infra*, § 777.

§ 750. When a suspected person attempts to escape or evade a threatened prosecution, it may be argued that he does so from a consciousness of guilt; and though this inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred. Hence it is admissible for the prosecution to show that the prisoner advised an accomplice to break jail and escape;¹ or that he offered to bribe one of his guards;² or that he killed an officer of justice when making such attempt;³ or that he attempted to bribe or intimidate witnesses.⁴ So with flight, to which no proper motive can be assigned,⁵ and with acts of disguise, concealment of person, family, or goods, and many other *ex post facto* indications of mental emotion.⁶ But it must be remembered that while these acts are indicative of fear, they may spring from causes very different from that of conscious guilt.⁷ “Many men are naturally of weak nerve, and, under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inconclusive facts, will be adduced in evidence against him; he may feel his inability to procure legal advice to conduct his defence, or to bring witnesses from a distance to establish it; he may be assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him; add to all this, more or less vexation must necessarily be experienced by all who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention

Inference from attempt to evade justice.

¹ *People v. Rathbun*, 21 Wend. 509; *Byles on Bills*, 449; *Fanning v. State*, 14 Mo. 386.

² *Whaley v. State*, 11 Ga. 123.

³ *Revel v. State*, 26 Ga. 275.

⁴ See *People v. Pitcher*, 15 Mich. 397; *State v. Staples*, 47 N. H. 113.

⁵ It is not necessary to show that the flight was on account of the charge. *State v. Frederick*, 69 Me. 400.

⁶ *Mittermaier*, Deutsch. St. sect. 12; *Lanahan v. Com.* 84 Penn. St. 80; *Dean v. Com.* 4 Grat. 541; *Hitner v.*

State, 19 Ind. 48; *Waybright v. State*, 56 Ind. 122; *Barron v. People*, 73 Ill. 256; *State v. James*, 45 Iowa, 412; *McMath v. State*, 55 Ga. 303; *State v. Beatty*, 30 La. An. 1266; *State v. Dufour*, 31 La. An. 804; *Gose v. State*, 6 Tex. Ap. 121; *Fanning v. State*, 14 Mo. 386; *People v. Pitcher*, 15 Mich. 397.

⁷ *Wills on Circumstantial Evidence*, 70; 1 Wh. & S. Med. Jur. (1873) § 805.

of surrendering himself into the hands of justice when the time for trial should arrive.”¹ The question, it cannot be too often repeated, is simply one of inductive probable reasoning from certain established facts. All the courts can do, when such inferences are invoked, is to say, that escape, disguise, and similar acts afford, in connection with other proof, the basis from which guilt may be inferred; but this should be qualified by a general statement of the countervailing considerations which a comprehensive view of the question induces.² To this effect is the charge of Abbott, J., in *Donnall’s* case, where he told the jury, that “a person, however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight.”³ So it is proper to keep in mind, as we have seen, the influence which might have been exerted upon the accused by the character of the tribunal before whom, and the mode of criminal procedure in the country where, the trial is to take place.⁴ Hence is it that con-

¹ Best’s Evidence, 5th ed. 578.

Dr. Thomas Fuller gives the following quaint excuse for running away from London when charged with treason:—

“And if any tax me, as Laban taxed Jacob, ‘Wherefore didst thou flee away secretly, without taking solemn leave?’ I say, with Jacob to Laban, ‘Because I was afraid.’ And that plain-dealing patriarch, who could not be accused for purloining a shoe latchet of other men’s goods, confessed himself guilty of that lawful felony that he ‘stole away’ for his own safety; *seeing Truth may sometimes seek corners, not as fearing her cause, but as suspecting her judge.*” Truth Maintained, Letter v.

See also Lord Clarendon’s letter to the House of Lords explanatory of his leaving England when under impeachment, and the reasons given by him why a man unjustly accused should evade meeting an unscrupulous prosecution. Compare Lister’s Life of Clarendon, ii. 415 *et seq.*

As an illustration to the same effect, drawn, however, from the opposite party in the English civil war under Charles I., may be mentioned the case of John Cotton, afterwards a leading New England divine, who, having been charged before the Court of High Commission with some rubrical irregularity, fled disguised to London, “but was there told by his friends, among whom were some very distinguished men, that ‘if he had been charged with crime, they could have obtained his pardon, but the sin of being a Puritan was unpardonable.’” Uhden’s N. E. Theoc. (Conant’s Tr.) 97.

² *State v. Williams*, 54 Mo. 170. But proof of flight of another person arrested and indicted for the same crime is not admissible. *Levison v. State*, 54 Ala. 520; *Crookham v. State*, 5 W. Va. 510.

³ Trial of Robert Saule Donnall, London, 1817.

⁴ Best on Presumptions, p. 322; *Tyner v. State*, 5 Humph. 383.

duct exhibiting indications of guilt should not be received by the court, unless there be satisfactory evidence that a crime has been committed. And in all cases the circumstances explaining or excusing flight are to be taken into consideration.¹

§ 751. For the same purpose, confusion, prevarication, and embarrassment on the defendant's part, when charged with the crime, may be put in evidence against him;² though it is not admissible for him to show that several days after the *corpus delicti* was discovered he appeared surprised when it was announced to him, such evidence being self-serving.³ But it should always be remembered how delusive this species of evidence is. "Blushing" has been declared to be an evidence of guilt; but many guilty men never blush at all, and some innocent men would blush at the mere idea that they are being looked at to see if they are blushing. "Terror" also has been noticed; but nervousness is not always an incident of guilt, nor the absence of nervousness always an incident of innocence. "Confusion" is as likely to mark the deportment of an innocent person, unused to be made a public spectacle, as that of a guilty person enured to such exposure.⁴

Prevarication and embarrassment may be proved.

¹ *Infra*, § 751. For this reason I cannot concur in *Kennedy v. Com.* 14 Bush, 341, in limiting the explanatory evidence produced.

² See *Com. v. McPike*, 3 Cush, 181; *Com. v. Goodwin*, 14 Gray, 55; *State v. Reed*, 62 Me. 129; *People v. McKee*, 36 N. Y. 113; *Levison v. State*, 54 Ala. 520; *Handline v. State*, 6 Tex. Ap. 347; 1 Wh. & St. Med. Jur. (1873) § 805.

³ *Campbell v. State*, 23 Ala. 44.

⁴ "I do not think," justly says Judge Learned, in charging the jury in *Lowenstein's case* (Pamph. Albany, 1874, p. 331), "much reliance is to be placed upon the manner of any man when he is suspected or accused of crime. I mean whether he looks pale or flushed, or the like, for it is impossible for us to tell how a man may act when he is accused of crime. Our own judgment in that is not very

reliable. One of you may appear to me flushed or frightened, and to another not so. Therefore I do not think much reliance is to be placed upon the opinion of witnesses as to manner. I don't speak of conduct, but as to manner." See *Russell v. State*, 53 Miss. 367.

As to the supposed symptoms of fear, Mr. Bentham gives the cautions which Mr. Best condenses as follows:—

"1st. The emotion of fear may not be present in the mind of the individual. Several of the above symptoms are indicative of disease, and characteristic of other emotions, such as surprise, grief, anger, &c. With respect to the first, for instance, 'blushing,' the flush of fever and the glow of insulted innocence are quite as common as the crimson of guilt. 2dly. The emotion of fear, even if actually

§ 752. The defendant will not be permitted to give evidence to account for his flight unless the prosecution prove the flight as tending to establish guilt ;¹ nor can he show that he refused to avail himself of an opportunity

Evidence
to explain
flight ad-
missible.

present, although presumptive, is by no means conclusive evidence of guilt of the offence imputed. The alarm may be occasioned by the consciousness of another crime, committed either by the party himself, or by others connected with him by some tie of sympathy, on whom judicial inquiry may bring down suspicion or punishment; 3 Benth. Jud. Ev. 157; or even by the recollection of a fact, in consequence of which, without any delinquency at all, vexation has been, or is likely to be, produced to him or them. Ibid. So, the apprehension of condemnation and punishment though innocent, or of vexation and annoyance from prosecution, is a circumstance the weight of which, like that of the evasion of justice, depends very considerably on the character of the tribunal before which, and the towns of criminal procedure in the country where his trial is to take place." Supra, § 462. "Lastly, the rare, though no doubt possible, case of the falsity of the supposed self-criminative recollection. 3 Benth. Jud. Ev. 157. *E. g.* an habitual thief is taken into custody for a theft; that he should show symptoms of fear is natural enough, and, confounding one of his exploits with another, he may (especially if the time of the supposed offence be very remote), imagine himself to recollect a theft in which, in truth, he bore no part." 3 Benth. Jud. Ev. 158.

When the bill allowing defendants in criminal cases the aid of counsel was before the House of Lords, the young peer who had charge of it broke

down in his opening speech. He recovered himself, however, and made his embarrassment a telling reason for the measure he was to advocate. "If I am confused in making my first speech," he said, "though this is a speech about another, what must it be with a man charged with crime, who knows that on what he says, and how he says it, his own life depends?" Few, except the most hardened and desperate of men, can stand such a test without flinching. And, apart from this, we have to consider the horror often incident to the first hearing of the perpetration of a great crime. In a famous English case, Spencer Cowper, of a historical family, which has been represented with like eminence in literature, in law, and in politics, was charged with the murder of a young girl with whom he had been intimate, and whose affections he had, however innocently, won. Her drowned body was discovered near a sequestered place where he had, at her request, on the preceding evening, appointed an interview with her. Suicide, or homicide, was the question; and if homicide were established, the indications pointed to Cowper. Her body, still reeking with water, was brought to the house, and he was suddenly charged by her relatives, maddened with grief, with the fearful crime. He staggered with horror under the shock, and this was made one of the main points against him on the trial that followed. He was acquitted ultimately, though after a fierce struggle, as party feeling was

¹ State v. Hays, 23 Mo. 287.

of flight.¹ And in such case evidence of subsequent public excitement, to justify an anticipation of violence, and thus rebut a presumption of guilt from flight, is admissible, if the excitement existed before the flight.²

§ 753. Presumptions resting on antecedent preparations are not presumptions of law, but mere inferences of fact, as to which it is the judge's duty, not to declare a positive rule, but simply to notice the processes of reasoning by which a just conclusion may be reached.³ Evidence of preparation is always admissible for the prosecution ; evidence to explain it is always admissible for the defence.⁴ Among the facts admissible, as affording in this way a basis of induction, are the purchasing, the collecting, the fashioning instruments of mischief, of which numerous cases are elsewhere given,⁵ and of which a familiar illustration is to be found in the admission of evidence on a trial for burglary to prove that the defendant had manufactured or procured the burglarious instrument.⁶ Under the same head fall cases where the evidence shows a repairing to the spot destined to be the scene of crime ; and acts done with the view of paving the way to the guilty enterprise.⁷ For the same purpose it is admissible, on an indictment for arson, to prove a prior insurance of the property, as

Antecedent preparations and previous attempts admissible for prosecution.

enlisted in the trial, Cowper's relatives being leaders among the Whigs, and the Tories undertaking to assume that party influence was enlisted to secure his acquittal. But acquitted he was, and righteously ; though it is said that afterwards, when on the bench, he dealt tenderly with men who, when on trial for their lives, were unmanned by the terrors of a trial. 1 Crim. Law Mag. 23.

¹ People v. Rathbun, 21 Wend. 509 ; Com. v. Hersey, 2 Allen, 173 ; Gardiner v. People, 6 Parker C. R. 155 ; Campbell v. State, 23 Ala. 28.

² State v. Phillips, 24 Mo. 475 ; Plummer v. Com. 1 Bush, 76 ; Golden v. State, 25 Ga. 527.

In Kennedy v. Com. 14 Bush, 341, it was held that to rebut the inference

of guilt which may be drawn from an escape and flight, evidence of apprehended danger, in order to be admissible, should show such danger as could not have been provided against either by the act of the accused or through the instrumentality of the officers of the law. But, as we have seen, this may be gravely questioned. Supra, § 750.

³ The admissibility of evidence on this point has been already considered. Supra, § 49.

⁴ State v. Pike, 65 Me. 111 ; Long v. State, 52 Miss. 23.

⁵ Supra, § 49 ; infra, § 799.

⁶ People v. Larned, 3 Selden, 445. See Com. v. Wilson, 2 Cush. 590 ; People v. Winters, 29 Cal. 658.

⁷ Com. v. Costley, 118 Mass. 1.

well as other attempts to destroy it, the object being to defraud the underwriters.¹

§ 754. In the same connection may be noticed false representations as to the state of another person's health, with the intention of preparing the relatives for the event of sudden death, and to diminish the surprise and alarm which attend its occurrence,² and letters addressed to the writer by himself for the purpose of diverting suspicion.³ It may also be noticed that persons contemplating secret assassination are apt, as part of their scheme, to throw out dark hints,

¹ Supra, §§ 49 *et seq.*; *Com. v. Bradford*, 126 Mass. 42. See *Com. v. McCarthy*, 119 Mass. 354; *State v. Du-bois*, 49 Mo. 573.

Leopold Freund was tried in Moravia, in 1874, for the murder of Ernst Katscher. Freund was a Bohemian vagabond, with little money and no employment; and saw Katscher, a rich brewer, at the railway station of Brünn, take out his pocket-book, and arrange its contents. Freund had previously purchased a third class railway ticket for the next station. In a moment, he seems to have arranged his entire plan. He bought a second class ticket for the next station, intending to get into the same carriage with Katscher, and to kill the latter when asleep. Of course he could have bought a ticket for a more distant station, and for this he had money enough; but he was unwilling to spend unnecessarily, and so he concluded that if Katscher did not fall asleep before the next station, then a second ticket for the second station could be bought, and so on until the victim could be noiselessly and unresistingly killed. Three tickets were in this way bought in succession, until at last Katscher, having fallen asleep, was attacked and his throat cut before he had time to cry out. Freund rifled

his victim's pocket-book, and when the train slackened speed, leaped out of the window. It was dark; and had he acted prudently he might for a time have baffled pursuit. But cautious as were his preparations, after the murder his cunning vanished. He threw the bloody pocket-book in a field. He stopped at an inn at Kögetin, where he left his blood-stained overcoat, as well as a series of receipts addressed to Katscher. He then walked back to Prosnitz, and went out to make purchases in a blood-stained shirt. But his preparations would have led to his conviction, even had he not in this reckless way left evidence of his guilt. The guard found Katscher's body alone in the carriage shortly after the murder; and the guard's attention had been previously curiously directed to Freund by his purchase, at three successive stations, of second class tickets. The guard was therefore able accurately to describe the assassin; and he would have been detected on this evidence, even if he had not left so many marks of guilt on the path by which he fled.

² *Wills on Circums. Ev.* p. 112. Supra, §§ 742 *et seq.*

³ Whitaker's case, *infra*, § 849.

spread rumors, and utter prophecies relative to the impending fate of their intended victims.¹

How far the suppression or concoction of evidence, after a crime has been committed, serves to point out the perpetrator, has been already considered.²

§ 755. It should be remembered, as Mr. Bentham reminds us, that there may be infirmative hypotheses which may make preparations apparently designed for a particular crime, consistent with innocence of that crime. Thus ^{Such proof is open to rebuttal.} to adopt, with some modifications, Mr. Best's paraphrase of Mr. Bentham :³ The intention of the accused in doing the suspicious act is a psychological question, and may be mistaken. His intention may either have been altogether innocent, or, if criminal, directed towards a different object. (1.) Thus, a person may be poisoned, and another, innocent of his death, may have purchased a quantity of the same poison a short time before for the purpose of destroying vermin. So predictions of approaching mischief to an individual, who is afterwards found murdered, may frequently be explained on the ground that the accused was really speaking the conviction of his own mind, without any criminal intention. Sometimes the most affectionate relatives indulge in predictions of this class in regard to a member of their family whom they would surrender their lives to save. Prophecies of death, also, are often the offspring of superstition or political prejudice. (2.) A. might purchase a sword or pistol for the purpose of fighting a duel with B., but, before the time of the meeting, the weapon might be purloined or stolen by C., in order to assassinate D. Or, to take a still broader case, A. manufactures guns in quantities to support a filibustering movement forbidden by our laws, and one of these guns is used by a purchaser

¹ 1 Stark. Ev. 565-6, 3d ed.

In the case of Susannah Holroyd, who was convicted at the Lancaster Assizes of 1816 for the murder of her husband, her son, and the child of another person, about a month before committing the crime the prisoner told the mother of the child that she had had her fortune read, and that within six weeks three funerals would go from her door, namely, that of her husband,

her son, and of the child of the person whom she was then addressing. And so, on the trial of Zephon in Philadelphia, in 1845, it was shown that the prisoner, who was a negro, had got an old fortune-teller in the neighborhood, of great authority among the blacks, to prophesy the death of the deceased.

² Supra, §§ 742 *et seq.*

³ Best's Ev. § 456.

to gratify private animosity. But even when preparations have been made with the intention of committing the identical offence charged, or previous attempts have been made to commit it, two things remain to be considered:¹ (a.) The intention may have been changed or abandoned before execution. Until a deed is done, there is always a *locus poenitentiae*;² and the possibility of a like criminal design having been harbored and carried into execution by other persons must not be overlooked.³ (b.) The intention to commit the crime may have existed throughout, but the criminal may have been anticipated by others.⁴

§ 756. Declarations of intention and threats are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not, but because from them, in connection with other circumstances, and on proof of the *corpus delicti*, guilt may be logically inferred. Evidence of this kind, for this purpose, is always competent;⁵ as where the prisoner, a negro, said

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¹ 3 Benth. Jud. Ev. 74.

² Whart. Crim. Law, 8th ed. § 187.

³ Ibid. § 160.

⁴ A remarkable instance of this is presented by the celebrated case of Jonathan Bradford. This man was an innkeeper. In the middle of the night, a guest in his house was found murdered in bed, his host standing over the bed with a dark lantern in one hand and a knife in the other. The knife and the hand which held it were both bloody, and Bradford on being thus discovered exhibited symptoms of the greatest terror. He was convicted and executed for this murder; but it afterwards appeared that it had been committed by another person, a short time before he came into the deceased's room. Bradford, however, had entered with a similar design, and the trepidation exhibited by him was imputable to his finding himself anticipated; while the blood on his hand and knife came from his having dropped the knife on the body in his perturbation. See this point dis-

cussed in Whart. Crim. Law, 8th ed. § 309.

⁵ Archbold's C. P. 283; *State v. Wentworth*, 37 N. H. 196; *State v. Alford*, 31 Conn. 40; *State v. Hoyt*, 46 Conn. —; *Stephens v. People*, 4 Parker C. R. 396; *La Beau v. People*, 34 N. Y. 223; *Mimms v. State*, 16 Oh. St. 221; *Heath v. Com.* 1 Robin. (Va.) 735; *Jones v. State*, 64 Ind. 400; *State v. Rash*, 12 Ired. 382; *Fulton v. State*, 58 Ga. 224; *Johnson v. State*, 17 Ala. 618; *Faulk v. State*, 52 Ala. 15; *Maxwell v. State*, 3 Heisk. 420; *Jackson v. State*, 6 Bax. 452; *Aycock v. State*, 2 Tex. Ap. 381.

“To the criminative force of discourse expressive of an intention to commit an offence of the nature of that eventually committed,” says Bentham, “the supposable facts that apply in the character of infirmative considerations are, in species and denomination, the same that have been seen applying in the case of preparations and attempts. But, forasmuch as words are apt to be

he intended "to lay for the deceased, if he froze, the next Saturday night," and where the homicide took place that night;¹ where it was said: "I am determined to kill the man who injured me;"² where the prisoner had declared, the day before the murder, that he would certainly shoot the deceased;³ and where the language of the defendant was: "I will split down any fellow that is saucy."⁴ Threats against a class may be put in evidence as explaining the character of an attack on an individual belonging to this class,⁵ though to make threats admissible there must be some kind of individuation, showing that the person injured was in some sense within the scope of the threats.⁶

uttered with less consideration than a course of preparation, attended with labor and hazard, is wont to be engaged and persevered in, the probative force of the criminative circumstance seems in general less considerable, and at the same time the disprobative force of the infirmative consideration more considerable. Being of the nature of confessorial evidence, viz., of that species of it which is extra-judicial and spontaneous, differing only in respect of relative time (the confessorial evidence being subsequent to the event, the evidence here in question antecedent), it stands exposed to the disprobative force of the same infirmative considerations as confessorial evidence. If the state of things expressed in the former instance, by the words intention different *ab initio* be exemplified here, this is as much as to say, that the declarations that have place here (viz. the declarations of an intention to commit the crime that in fact was afterwards committed), were false. Supposing such to be the case, the inferences that may be drawn from them, and the infirmative considerations that apply to their probative force in the character of criminative circumstances, are the same as in the case of false extra-judicial and spon-

taneous confessorial evidence, or false responsion.

"The supposition that these declarations are false may, at first view, be apt to appear inconsistent with the supposition all along made; viz. that the crime in question has actually been committed, and that by whom committed (or rather, whether committed by the supposed delinquent), is the only remaining subject of inquiry. But whether the crime actually committed by the supposition had or had not the supposed delinquent for a sharer in it, — the declarations made of an intention to commit a crime of that or a similar description may, at the time when made, have been false; and declarations of an intention to commit a crime are no less susceptible of being false than declarations of the opposite cast, viz. declarations of an intention to abstain from the commission of that or a similar crime." Bentham's Rat. Jud. Ev. iii. 75.

¹ Jim v. State, 5 Humph. 146.

² Com. v. Burgess, 2 Va. Cas. 484.

³ Com. v. Smith, 7 Smith's Laws, 697.

⁴ Res. v. Mulatto Bob, 4 Dall. 146.

⁵ Hopkins v. Com. 50 Penn. St. 9; Dixon v. State, 13 Fla. 636.

⁶ Supra, § 29.

Several considerations, however, have already been adverted to, which divert the application of evidence of antecedent preparations, and which apply with equal force to threats.¹ In addition to these it is important to keep in mind Mr. Bentham's cautions: 1st. The words supposed to be declaratory of criminal intention may have been misunderstood or misinterpreted. 2d. It does not necessarily follow, because a man avows an intention or threatens to commit a crime, that such intention really exists in his mind. The words may have been uttered in a transient fit of anger, or through bravado, or with a view of intimidating, annoying, or of extorting money, or other collateral objects. Thus Dr. Parkman may have frequently been the object of threats or curses of this kind from irritated debtors, and yet it was from a man who used neither that his death proceeded. 3d. Another person, really desirous of committing the offence, may have used the threats as a screen to avert suspicion from himself.² 4th. It must be recollected that the tendency of a threat or declaration of this nature is to frustrate its own accomplishment.³ By threatening a man you put him on his guard, and force him to have recourse to such means of protection as the force of the law, or any extra-judicial powers which he may have at command, may be capable of affording him. Still, however, such threats, as observed by Mr. Bentham, when specific, "by the testimony of experience, are but too often sooner or later realized. To the intention of producing terror, and nothing but terror, succeeds, under favor of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief, and, in pursuance of that intention, the mischievous act."

§ 757. Can evidence to the effect that the deceased, prior to a homicide, threatened the defendant's life, be received; and if so, is it a prerequisite to the proof of such threats that they should be shown to have been communicated to the defendant? Certainly, if such evidence is offered to prove that the defendant had a right to kill the deceased, there being no proof of a hostile demonstration by deceased,

Deceased's
threats ad-
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for de-
fence.

¹ See, as giving cautions on this point, *R. v. Hagan*, 12 Cox C. C. 311; *State v. Brown*, 64 Mo. 367. the *Causes Célèbres*. 5 *Causes Célèbres*, 437.

² An instance of this is given in *Bentham*, quoted in *Best on Presumptions*, 315, to which several of the above illustrations and points are to be credited.

then it is irrelevant.¹ If A. threatens B.'s life, and the threat is known to B., B.'s duty is to have A. arrested by due process of law, not to shoot him; the right of self-defence being conditioned on an apparent actual attack.² On the other hand, if the question is as to which party in the encounter is the assailant, then it is admissible to prove by the prior declarations of either that the attack was one he intended to make. Threats to this effect by the defendant are always, as has been seen, admissible;³ and it is properly held that there is equal reason, supposing a collision between the deceased and the defendant to be first proved, for the admission of threats by the deceased.⁴

It is true, that by some courts it has been insisted that to make the deceased's threats prior to the encounter admissible, they must be proved to have been brought to the knowledge of the defendant.⁵ But it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defendant knew beforehand that his life was threatened, it might be argued that he should have applied to the law for redress;

¹ *Hughey v. State*, 47 Ala. 97; *State v. Leonard*, 6 La. An. 420; *State v. Mullen*, 14 La. An. 577; *Evans v. State*, 44 Miss. 762; *Harris v. State*, 47 Miss. 318; *State v. Hays*, 23 Mo. 287; *State v. Hall*, 9 Nev. 58; *Myers v. State*, 33 Tex. 525.

² Whart. Crim. Law, 8th ed. § 488.

³ See *supra*, § 756.

⁴ *Com. v. Wilson*, 1 Gray, 337; *People v. Shorter*, 4 Barb. 460; *S. C.*, 2 Comstock, 197; *Patterson v. People*, 46 Barb. 625; *People v. Rector*, 19 Wend. 599; *Stokes v. People*, 53 N. Y. 164; *Collins v. State*, 32 Iowa, 36; *Cornelius v. Com.* 15 B. Monr. 539; *Rapp v. Com.* 14 B. Monr. 615; *Powell v. State*, 19 Ala. 577; *Dupree v. State*, 33 Ala. 380; *Powell v. State*, 52 Ala. 1; *Monroe v. State*, 5 Ga. 85; *Howell v. State*, 5 Ga. 48; *Scoggins v. People*, 37 Cal. 677; *Campbell v. People*, 16 Ill. 17; *Schnier v. People*,

23 Ill. 17; *Williams v. People*, 54 Ill. 422; *State v. Thawley*, 4 Harring. 562; *State v. Abbott*, 8 W. Va. 741; *De Forest v. State*, 21 Ind. 23; *State v. Sloane*, 47 Mo. 604; *State v. Hays*, 23 Mo. 287; *State v. Keene*, 50 Mo. 359; *State v. Taylor*, 64 Mo. 358; *Pitman v. State*, 22 Ark. 354.

⁵ *Powell v. State*, 19 Ala. 577; *Newcomb v. State*, 37 Miss. 383; *State v. Jackson*, 17 Mo. 544; *State v. Harris*, 59 Mo. 550; *State v. Elkins*, 63 Mo. 159; *State v. Taylor*, 64 Mo. 358; *State v. Dumphey*, 4 Minn. 438; *Coker v. State*, 20 Ark. 53; *People v. Henderson*, 28 Cal. 465; *People v. Lombard*, 17 Cal. 316. See *State v. Ridgely*, 2 Har. & McH. 120; *Peterson v. State*, 50 Ga. 142; *Atkins v. State*, 16 Ark. 568; *Pridgen v. State*, 31 Tex. 420; *State v. Gregor*, 21 La. An. 473; *State v. McCoy*, 29 La. An. 593; *State v. Ryan*, 30 La. An. 1176.

if he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper, whether such proof consist of preparations or declarations, is pertinent to show that the attack was made by the deceased. The question whether A. (the defendant) or B. (the deceased) was the aggressor in the fatal collision is to be determined; and if in such case A.'s threats are admissible to prove that A. was the aggressor, B.'s threats, by the same reasoning, are admissible to prove that B. was the aggressor. For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack, and if so with what motive, his prior declarations, uncommunicated to the defendant, that he intended to attack the defendant, are proper evidence. And so it has been frequently held.¹ They are, however, inadmissible, unless proof be first given that there was an overt act of attack, and that the defendant, at the time of the collision, was in apparent imminent danger.² It need scarcely be added that all threats which are part of the *res gestae* are *per se* admissible.³

¹ Wiggins v. State, 93 U. S. 465; State v. Goodrich, 19 Vt. 116; People v. Stokes, 53 N. Y. 164; Campbell v. People, 16 Ill. 17; Holler v. State, 37 Ind. 57; Little v. State, 6 Bax. 49; cited Hor. & Thomp. Cas. on Self-Def. 487; State v. Turpin, 77 N. C. 473; Keener v. State, 18 Ga. 194 (limited to self-defence in Lingo v. State, 29 Ga. 470); Hoyer v. State, 39 Ga. 718; Burns v. State, 49 Ala. 370; Pitman v. State, 22 Ark. 574; Palmore v. State, 29 Ark. 248; Davidson v. People, 4 Cal. 145. See Lyon v. Hancock, 35 Cal. 372; People v. Swenson, 49 Cal. 388; Com. v. Andrews, Whart. on Hom. § 627.

² Ibid.; State v. Turpin, 77 N. C. 473; Payne v. State, 60 Ala. 80; Edwards v. State, 47 Miss. 581; Holly v. State, 55 Miss. 424; Kendricks v. State, 55 Miss. 436; State v. Maloy, 44 Iowa, 104; State v. Elliott, 45 Iowa, 486; State v. Harris, 59 Mo.

550; State v. Alexander, 66 Mo. 148; State v. Hall, 9 Nev. 58; State v. Ferguson, 9 Nev. 106; Morgan v. Com. 14 Bush, 106. See Blackburn v. State, 23 Oh. St. 146, cited supra, § 24.

It is admissible to put in evidence "previous threats and conduct of Bailey (the deceased) as having some tendency to explain the character of his assault on Brownell. The attack was in the night, and no witness could see very clearly at any distance what may have been manifest to Brownell as to the extent of his danger." Campbell, C. J., Brownell v. People, 38 Mich. 736.

The following notice of recent cases I extract from an article furnished by me to the Southern Law Review for June, 1878, p. 261:—

"Two new cases are reported on the question of the admissibility, on trials for homicide, of evidence of ut-

³ R. v. Edwards, 12 Cox C. C. 230. Supra, § 262.

§ 758. When we take up the presumption arising from the possession of stolen goods, we have again to deplore the looseness of phraseology which assigns one term, presumption, to processes so very different as fictions, presumptions of law, and inferences. Of the confusion

Possession of stolen goods or of other fruits of crime.

terances by the deceased, threatening the life of the defendant, such utterances not having been reported to the deceased. One of these cases, decided in 1877 (*The State v. Taylor*, 64 Mo. 358), has a head-note which states explicitly that uncommunicated threats by the deceased are inadmissible when offered by the defendant. When we examine the opinion of the court, however, we find that the ruling is limited to cases where the defendant makes no claim to have been acting in self-defence. 'The court,' says Henry, J., 'properly refused to admit evidence of threats by Ghenn against defendant. *It is not pretended that defendant, when he killed Ghenn, was acting in self-defence.* Defendant was aggressor in the difficulty in the forenoon, and, when shot by defendant, Ghenn was not only making no attempt to injure defendant, but was unarmed and endeavoring to escape from him.'

"The other case is *The State v. Turpin*, 77 N. C. 473, also decided in 1877. In this case a '*per curiam*' opinion was given by Bynum, J., who says :—

"1. The uncommunicated threats were admissible for the purpose of corroborating the evidence of the threats which had been already given.

"2. They were admissible to show the state of feeling of the deceased towards the prisoner, and the *quo animo* with which he had pursued his enemy to the house.

"3. In ascertaining whether the prisoner had acted in self-defence a most material question was, who in-

troduced the rock into the conflict, and for what purpose? To corroborate this view, and fix the ownership of the rock, the prisoner offered evidence both of the violent character and deadly threats of the deceased. In this aspect of the case *the threats were equally admissible, whether communicated or uncommunicated*, and, in connection with the other facts indicating a felonious assault upon the prisoner, would constitute a case of murder, manslaughter, or justifiable homicide, as the jury, under proper instructions, might determine upon all the facts.

"Prior to these cases, but not cited in either of them, we have *Wiggins v. The People*, 3 Otto (93 U. S.), 465. In this case we have the following from Judge Miller:—

"Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by decisions of courts of high authority, which is very well stated by Wharton, in his work on Criminal Law, section 1027. 'Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the

which thus arises the "presumption" now before us is the most striking illustration. It is really an inference of fact; but frequently, from the notion that inferences and presumptions of law are convertible, has been declared to be a presumption of law. But the difference will at once be seen by recurring to the distinct processes of reasoning which are thus invoked. The presumption of law, granting its minor premise, establishes a certainty. It says, for instance: "All persons under seven years are presumed incapable of crime; A. is under seven years; he is therefore incapable of crime." If A. is under seven years, then the conclusion is a certainty, and the jury must be directed so to find. This, in fact, is deductive reasoning, in which the major premise is matter of law, and in which all that remains to the jury is to find as to the truth of the minor premise. But in in-

meeting the deceased was seeking defendant's life.'

"It may be objected that such evidence is hearsay. To this it may be answered: —

"1. It is primary; and hearsay, when primary, is admissible when relevant. The question at issue is, did the deceased attack the defendant? self-defence being set up by the defendant in confession and avoidance. To prove an attack by the deceased — to show, in other words, that his object in meeting the defendant was to attack him — the deceased's intention is material. How is this intention to be discovered? If the deceased were alive, we would call him and ask him as to the facts. He is not alive, and the best evidence we can have of an intended attack on his part is his own expressions, whether in word or in deed. If we reject these expressions, then we have no other way of proving a material fact.

"2. Whenever the condition of a party's mind is at issue, then expressions of the party are admissible, when tending to throw light upon such condition. See *Hadley v. Carter*, 8 N. H. 40; *Com. v. O'Connor*, 11 Gray, 94;

Howe v. Howe, 99 Mass. 88. This is eminently the case when the party whose declarations are to be proved is dead, and where his state of mind, when material, can be proved in no other way than by his declarations. In *R. v. Johnson*, 2 Car. & Kir. 354, where the prisoner was charged with murdering her husband, and when the deceased's state of health prior to the day of his death became material, a witness was called to prove declarations on this topic by the deceased a day or two before the death. This was objected to by the prisoner, but was admitted by Alderson, B., who said that he thought that what the deceased said to the witness was reasonable evidence of the deceased's state of health at the time. And in a suit on a policy of life insurance, it was held admissible to show that the deceased had made declarations at various times as to his health at variance with those which he had given to the defendants. His good faith at the time was at issue, and his declarations were held admissible to negative such good faith. *Aveson v. Kinnaird*, 6 East, 188; *Witt v. Klindworth*, 3 S. & T. 143."

ferences, such as those immediately before us, the process is inductive, and neither major nor minor premise is matter of law.¹ Thus in the case of the inference from receiving stolen property the reasoning is as follows : —

“ The proportion of guilty persons holding stolen goods to innocent is two to one : A. holds stolen goods ; therefore the probability of his guilt is two to one.” Now as to this process it is to be remarked : (1.) That the major premise is a statement which is of no value unless it is based upon a large observation of facts ; (2.) That the conclusion is only a probability ; and (3.) That no case arises in which the question comes up pure and simple, for in all cases the fact of possession is mixed with some other qualifying fact or inference.

Taking up, then, the point immediately before us, we may say that the court may properly tell the jury that the possession by a party of stolen goods is a fact from which his complicity in the larceny may be inferred.² But the possession must be personal ;³ must be recent ;⁴ must be unexplained ;⁵ and must in-

¹ See *supra*, § 716, and remarks of Mr. Best in note.

² *Knickerbocker v. People*, 48 N. Y. 177; *Stover v. People*, 56 N. Y. 315; *Mimms v. State*, 16 Oh. St. 221; *Smathers v. State*, 46 Ind. 447; *Smith v. State*, 58 Ind. 340; *State v. Brown*, 25 Iowa, 561; *State v. Golden*, 49 Iowa, 48; *Crilley v. State*, 20 Wis. 231; *Gregory v. Richards*, 8 Jones (N. C.), 410; *Tucker v. State*, 57 Ga. 503; *Foster v. State*, 52 Miss. 595; *State v. Gray*, 37 Mo. 463; *State v. Creson*, 38 Mo. 372; *Lewis v. State*, 4 Kans. 296.

³ *R. v. Hughes*, 14 Cox C. C. 223; 39 L. T. (N. S.) 292.

⁴ *R. v. Rickman*, 2 East P. C. 1035; *R. v. Cockin*, 2 Lew. C. C. 235; *R. v. Dewhurst*, 2 Stark. Ev. 614; *R. v.*

—, 2 C. & P. 459; *R. v. Evans*, 2 Cox C. C. 270; *R. v. Adams*, 3 C. & P. 600; *R. v. Partridge*, 7 C. & P. 551; *R. v. Harris*, 8 Cox C. C. 333; *R. v. Hughes*, 14 Cox C. C. 223; *State v. Merrick*, 9 Me. 398; *Com. v. Millard*, 1 Mass. 6; *Com. v. Montgomery*, 11 Met. (Mass.) 534; *Davis v. People*, 1 Parker C. R. 447; *Stover v. People*, 56 N. Y. 315; *Sloane v. People*, 47 Ill. 76; *Comfort v. People*, 54 Ill. 404; *Engleman v. State*, 2 Cart. 1; *People v. Walker*, 38 Mich. 106; *Gablick v. People*, 40 Mich. 716; *Warren v. State*, 1 Greene (Iowa), 106; *State v. Taylor*, 25 Iowa, 273; *State v. Emerson*, 48 Iowa, 172; *Heed v. State*, 25 Wis. 421; *Hughes v. State*, 8 Humph. 75; *Hunt v. Com.* 13 Grat. 757; *State v. Adams*, 1 Hayw. 463; *State v.*

⁵ *R. v. Evans*, 2 Cox C. C. 270; *R. v. Dibley*, 2 C. & K. 818; *State v. Merrick*, 19 Me. 398; *Dillon v. People*, 1 Hun, 670; 4 Thomp. & C. 205; *Jones v. People*, 12 Ill. 259; *State v. Brady*, 27 Iowa, 126; *State v. New*, 22 Minn. 71; *State v. Graves*, 72 N. C. 482; *Curtis v. State*, 6 Cold. 9; *Sartorius v. State*, 24 Miss. 602.

volve a distinct and conscious assertion of property by the defendant.¹ If the explanation involves a falsely disputed identity or other fabricated evidence, the inference increases in strength;² and so where the goods are part of a mass of stolen property;³ and where the case is that of a forged instrument held by one claiming under it.⁴

§ 759. The possession, as has been just noticed, must be recent. But what is "*recent*?" The cases on this point, as heretofore given, are very numerous, and on a general view of their contents we are led to the conclusion that "*recent*," as here used, is a term incapable of exact definition, and that what is "*recent*" varies, within a certain range, with the conditions of each particular case. There are, however, certain additional circumstances, the presence or

Graves, 72 N. C. 482; State v. Bennett, 2 Tread. Const. R. 692; Jones v. State, 26 Miss. 247; Jones v. State, 30 Miss. 653; Belote v. State, 36 Miss. 96; State v. Wolff, 15 Mo. 168; State v. Floyd, 15 Mo. 349; State v. Lange, 59 Mo. 418; State v. Hill, 65 Mo. 84; Yates v. State, 37 Tex. 202; Perry v. State, 41 Tex. 485; Beck v. State, 44 Tex. 430; People v. Kelly, 28 Cal. 423. That presumption is rebuttable see State v. Snell, 46 Wis. 524.

Possession by a letter-carrier of a bank note some months after it has been sent by post and lost is not sufficient evidence of a felonious stealing by him, although not accounted for otherwise than by his mere assertion that he found it. R. v. Smith, 3 F. & F. 123 — Bramwell.

¹ 1 Ben. & Heard Lead. Cas. 360; R. v. Mansfield, C. & M. 142; R. v. Hinley, 2 M. & R. 524; State v. Bishop, 51 Vt. 217; Com. v. Randall, 119 Mass. 107; State v. Williams, 2 Jones (N. C.), 194; Davis v. State, 50 Miss. 86; Hall v. State, 8 Ind. 439; Turbeville v. State, 42 Ind. 490; Bailey v. State, 52 Ind. 462; State v. Walker, 41 Iowa, 217; State v. Hessians, 50 Iowa, 135; State v. En, 10 Nev. 279;

Garcia v. State, 26 Tex. 209; Thomas v. State, 43 Tex. 658. See Gose v. State, 6 Tex. Ap. 121; Conner v. State, 6 Tex. Ap. 457.

Where the prisoner was the servant of a firm which owned a large number of shovels, four of which were found in his possession, it was held that the question of larceny was properly left to the jury, although there was no evidence to show when they were missed, or how long they had been in his possession. R. v. Knight, L. & C. 378.

On the trial of an indictment for having obtained the property of another by threats, evidence that the same property was discovered, in a concealed state, in the house of the prisoner, is admissible, as going to show that the prisoner was conscious of having obtained it improperly. State v. Bruce, 11 Shep. 71.

² Steph. Dig. C. L. art. 308; R. v. Evans, 2 Cox C. C. 270; R. v. Dibley, 2 C. & K. 818; R. v. Burton, Dears. 282; State v. Bennett, 2 Const. R. 692.

³ See supra, § 44; R. v. Bowman, Allison C. L. 314.

⁴ Com. v. Talbot, 2 Allen, 161.

absence of which tends to expand or contract this particular inference of guilt.¹ These will be now noticed.

§ 760. Has the article in the defendant's possession such ear-marks as made it his duty, on its coming into his hands, to seek out its owner?² For, supposing even that he *found* it, yet, if it has such ear-marks, he is guilty of larceny if he do not return it to the party whose property he is thus notified it is.³ Hence the question of "recent"

Ear-marks
to be
proved.

¹ In October, 1872, a gentleman of New Orleans discovered in a junk shop in Louisville, Kentucky, a watch given by Washington to Lafayette, in 1781. The watch, according to a report of its appearance, "is open faced, of gold, with a double case, and may be remarked as of a peculiar appearance, being of only ordinary size, but nearly as thick as it is wide. The outer case bears upon its entire surface carved figures in bas-relief, representing the picture of Mars offering a crown to the Goddess of Peace, who is surrounded by her emblems, while over all appear the stern implements of war, hung high out of reach. On the inner case appears the yet clearly legible inscription: 'G. Washington to Gilbert Motier de Lafayette. Lord Cornwallis's Capitulation, Yorktown, Decb'r 17, 1781.' On the covering of the works is seen the maker's name, 'E. Hallfax, London, 1759.'" It was stolen from Lafayette in 1824, when in Tennessee, during his progress through the United States in that year; and in vain were instituted the most active measures for the detection of the thief, including a reward of a thousand dollars by the governor of Tennessee. Now in view of the singularly conspicuous character of the watch, and the remarkable publicity given to its theft, no one who had it in possession could, if that possession were unexplained, have at first successfully defied the inference of lar-

ceny which such possession created. Yet there was necessarily a time when, even as to this remarkable watch, this inference was to fade away. For three, five, or even seven years, it would be possible and proper to say to the holder of the watch, "You must explain how you got this, and prove yourself innocent, or else you will be held to be guilty." But after seven years, if we adopt the well known analogy of time as ebbing in other relations, the inference of larceny, even as to this particular article, might be held gradually to pass away. Certainly after thirty years, the average duration of a generation, it could be no longer rightfully made.

² See *Com. v. Tolliver*, 119 Mass. 312; *Com. v. Brown*, 76 Penn. St. 319.

³ Whart. Crim. Law, 8th ed. § 901.

"In *R. v. Dredge*, 1 Cox C. C. 285, the prisoner was indicted for stealing a doll and other toys. The prosecutor proved that he kept a large toy-shop, and that the prisoner came into the shop dressed in a smock frock. After remaining there some time, from some suspicion that was excited, he was searched, and under his smock frock were found concealed the doll and other toys. The prosecutor could not go further than to swear that the doll had once been his, but he could not swear that he had not sold it, and he had not missed it; and from the mode in which he kept his stock it was not

is much affected by that of marks of this class. Thus a book without any name upon it, or any mark to identify it as belonging to any particular private owner, may innocently be picked up at a book-stall within a few hours after it was stolen. Yet, notwithstanding the "recentness" of the stealing, no jury would or should convict a person in whose possession the book was found, although he should be unable to remember the book-stall at which he bought it, or in any way to corroborate his story. For the purchase of second-hand books at book-stalls is of such every-day occurrence, and in a large city book-stalls are so numerous, and so easily confused in the memory, that it would be both irrational and unsafe to convict of larceny simply because the defendant had in his possession, shortly after it was stolen, a book which had nothing on its face to show that it had been taken feloniously from any particular owner. It would be otherwise, however, with a book of marked appearance, and peculiar value, containing an owner's name. Recent possession, also, of an ordinary coin amounts to but little; it is otherwise as to possession of a collection of coins which are unique and rare.¹

§ 761. What the defendant said on the discovery of the goods with him is admissible in his favor, if made instantaneously and without opportunity of concoction, as part of the *res gestae*.² So far as concerns *subsequent* explanations, it may be noticed that the law in this respect has been materially affected by the statutes authorizing the ex-

Defendant's explanation to be considered.

likely that he would miss that or any other of the articles found on the prisoner. Erle, J., directed an acquittal. In *R. v. Burton*, Dears. C. C. 282, the prisoner was indicted for stealing pepper. He was found coming out of a warehouse in which there was a quantity of pepper both loose and in bags; when stopped and accused, he threw some pepper on the ground, and said, "I hope you will not be hard with me." Upon the case of *R. v. Dredge* being cited, Maule, J., pointed out the distinction that in this case the prisoner had, in fact, admitted that the pepper had not been honestly come by; and he added: "If

a man go into the London Docks sober, and comes out of one of the cellars, wherein are a million gallons of wine, very drunk, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was missed." Roscoe's Cr. Ev. 8th ed. § 19. See *R. v. Hooper*, 1 F. & F. 85.

¹ *People v. Getty*, 49 Cal. 581. See *People v. Noregea*, 48 Cal. 123, to the effect that naked possession is not enough to sustain conviction.

² *Supra*, § 691; *Davis v. People*, 1 Parker C. R. 447; and cases cited to succeeding notes in this section.

amination of defendants in their own behalf. Under the old law it was appropriate to speak of *unexplained* inferences, because, as to the defendant, all inferences were unexplained. He could not open his lips; and so far as he was concerned, the inference was rendered far less cogent by the fact that his silence was compulsory, and hence that this silence could not be counted against him. Hence the law, when any considerable period of time — say one, two, or three months — elapsed between the stealing of an article and its discovery, was prompt to invoke other counter and cancelling inferences, — *e. g.* “from certain facts it may be inferred that the defendant bought the article *bond fide*, or that it was put in his house as a trap, and, as he cannot tell us, we must give him the benefit of this supposition.” But now, when the defendant *can* tell us, and declines to do so, it may be argued in jurisdictions where such argument is not forbidden by statute that the term “recent,” in this relation, is not to be so sharply defined. In any view, the inference to be drawn from the possession of stolen goods is not one of law, but of probable reasoning, as to which the court may lay down logical tests for the guidance of the jury, but can impose no positive binding rule.¹

¹ See, as giving a restrictive view of the inference, *People v. Chambers*, 18 Cal. 383; *People v. Brown*, 48 Cal. 253. See *People v. Cleveland*, 49 Cal. 578.

“If the party have secreted the property; if he deny that it is in his possession, and such denial is discovered to be false; if he cannot show how he became possessed of it; if he give false, incredible, or inconsistent accounts of the manner in which he acquired it; if he has disposed of, or attempted to dispose of it at an unreasonably low price; if he has absconded, or endeavored to escape from justice; if other stolen property, or picklock keys, or other instruments of crime, be found in his possession; if he were seen near the spot at or about the time the act was committed; or if any article belonging to him be found at the place or in the locality where the

theft was committed, at or about the time of the commission of the offence; if the impression of his shoes or other articles of apparel correspond with the marks left by the thieves; if he has attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or officers of justice, — these and all like circumstances are justly considered as throwing light upon and explaining the fact of possession, and render it morally certain that such possession can be referable only to a criminal origin, and cannot otherwise be rationally accounted for.” *Wills Circum. Ev.* p. 57.

“In *R. v. Crowhurst*, 1 C. & K. 370, the prisoner was indicted for stealing a piece of wood; upon the piece of wood being found by the police constable in the prisoner’s shop about five days after it was lost, he

The inference of stealing may be rebutted by counter inferences indicating that the property was obtained honestly.¹ Thus, where the defendant was charged with stealing a shawl and vest on June 1st, 1870, and the shawl was found in his possession on July 12th, it was held admissible for him to offer any evidence from which it might be inferred that he obtained the shawl by purchase.²

§ 762. In cases of larceny and embezzlement, similar inferences may be drawn from sudden accessions of property by persons previously poor.³ In homicide, it is in like manner admissible to trace to the defendant articles of property connected with the deceased.⁴ A remark-

Similar inference in embezzlement and murder.

stated that he bought it of a man named Nash, who lived about two miles off. Nash was not called as a witness for the prosecution, and no witness was called by the prisoner. Alderson, B., said to the jury, 'in cases of this nature you should take it as a general principle that, where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on the prisoner.' It appears, therefore, that the learned judge thought that in this case the prisoner's account was sufficiently reasonable to shift the burden of proof back again on to the prosecutor, but the report does not state whether or not the case was left to the consideration of the jury. In *R. v. Wilson*, 26 L. J. M. C. 45, the prisoner was indicted for stealing some articles of dress. It was proved that the property was stolen, and sold by the prisoner. The prisoner, on being apprehended, said that C. and

D. brought them to his house, and that he sold them. In consequence of this C. and D. were apprehended, and C. was tried and convicted for stealing other articles taken from the prosecutor's house at the same time as the articles in question; D. was discharged. The constable made inquiries as to the statement made by the prisoner of how he came by the goods, but no evidence of what transpired on such inquiries was received, being objected to by the prisoner's counsel. Neither C. nor D. were called as witnesses for the prosecution, and no witness was called by the prisoner. The jury found the prisoner guilty, and the conviction was upheld by the Court of Criminal Appeal, upon the ground, as stated by Pollock, C. B., that there was some evidence for the jury upon which the prisoner might be convicted." *Roscoe's Cr. Ev.* (8th ed.) 21.

¹ *Shackleford v. State*, 2 Tex. Ap. 385; *Dixon v. State*, 2 Tex. Ap. 530.

² *Way v. State*, 35 Ind. 409.

³ See *Com. v. Montgomery*, 11 Met. 534, and cases cited; *State v. Grebe*, 17 Kans. 458; *McCoy v. State*, 44 Tex. 616; *Foster v. State*, 1 Tex. Ap. 531.

⁴ *R. v. Burdett*, 4 Barn. & A. 1-95; *R. v. Courvoisier*, *Wills on Cir.*

able case of this kind occurred in Philadelphia, in 1845, on the trial of a German named Papenburg for murder. Towards the close of the case a handkerchief was accidentally drawn from a coat which it was proved he had worn on the night of the offence. On this handkerchief was pencilled, apparently in blood, the

Ev. 241; Williams v. Com. 29 Penn. St. 102.

Mr. Burrill (Circumstantial Evidence, pages 457-9) says: "In the last section, the effect of the recent possession of the fruits of crime was considered, so far as such possession was a visible one, capable of direct proof, and confirmed by actual identification of the objects found in possession. But such possession may also sometimes be inferred from observed circumstances. In most cases, the fruits of crime themselves are so well concealed from view by the perpetrator, as to furnish no immediate evidence against him. There is nothing visible in his possession, which can be directly traced to or connected with the offence. But they sometimes betray themselves by their consequences, as by a sudden and material change in life or circumstances, indicating beyond question the recent receipt of money or property from some quarter. Where a person, previously known to be poor, is found shortly after a robbery, larceny (Com. v. Montgomery, 11 Met. 534), or murder, in the possession of considerable wealth, it is always a circumstance of suspicion, and, when corroborated by others, of material weight in connecting the crime with its perpetrator. It is, generally, one of the earliest indicatory circumstances that are discovered, and, in several recorded cases, has had the effect of first attracting attention in the right direction, and affording the first available clew to the discovery of the offender. In the case of Moses Drayne (5 Lond. Leg. Obs.

123-5), A. D. 1654, where a traveller had been murdered at an inn for a sum of money which he had with him, and had deposited with the innkeeper for safe keeping, it appeared in evidence that the hostler of the inn, who was at the time worth nothing of his own, shortly after the murder lent sixty pounds to a woman who kept an inn in the same town. It appeared, also, that the circumstances of the innkeeper himself had suddenly improved. For before the murder he was so poor that his landlord would not trust him for a quarter's rent, but would make him pay every six weeks; and he could not be trusted for malt, but was forced to pay for one barrel under another. But shortly after he bought a ruined malt-house and new built it; and usually laid out forty pounds in a day to buy barley. There was also observed upon a sudden a great change in his daughters' condition, both as to their clothes and otherwise; and if there was but a hood bought for one of the daughters, there was a piece of gold changed, and they were observed to have gold in great plenty. In the French case of M. D'Anglade (5 London Leg. Obs. 231, 233), A. D. 1687, it was proved that both the real criminals had suddenly, from a state of the lowest indigence, appeared to be in affluent circumstances; dressing in expensive clothing, and showing large sums of money; and that one of them had purchased an estate for which he had paid between nine and ten thousand livres."

profile of a broken hatchet, which was proved to have belonged to the deceased prior to the fatal blow. Still this was dangerous evidence, deriving its force from the improbability of the counter-presumption that the coat had been so placed, between the homicide and the trial, as to admit of the handkerchief being slipped in by a third person,—a feat which Boynton's case, already stated, shows to be not unprecedented.

On a trial for murder, there having been evidence that the murdered woman had money, and that the prisoners had spoken of robbing her, the account of her administrator was, in Pennsylvania, held admissible to show that he found no money.¹

§ 763. Where the charge is burglary, it is alleged that mere possession of the stolen goods, unaccompanied by other suspicious circumstances, is not enough to give *prima facie* evidence of the burglary.² But it is otherwise when there is indicatory evidence on collateral points.³

III. INFERENCES FROM MECHANISM OF CRIME.

§ 764. Undoubtedly we find it constantly stated that from a deadly instrument the law presumes a deadly design.⁴ But, in the first place, this, so far as it concerns the logical process, is a mere *petitio principii*; the design

¹ Howser v. Com. 51 Penn. St. 332. But see Com. v. Sturtivant, 117 Mass. 122. Infra, § 784.

² Davis v. People, 1 Parker C. R. 447; Jones v. People, 6 Parker C. R. 126; Walker v. Com. 28 Grat. 969; People v. Gordon, 40 Mich. 716; State v. Reid, 20 Iowa, 413. See Frank v. State, 39 Miss. 705. Possession by the prisoners of part of the stolen property very soon after the burglary, with an account given of it, which is not reasonable or credible, is sufficient *prima facie* evidence, without express evidence to falsify it. It is so, however, only if the account given is not reasonably credible. R. v. Exall, 4 F. & F. 922 — Pollock. See, as qualifying this, R. v. Langmead, 9 Cox C. C. 467. Compare Whart. Crim. Law, 8th ed. § 813.

³ Knickerbocker v. People, 57 Barb. 365; Methard v. State, 19 Oh. St. 363; Breese v. State, 12 Oh. St. 146.

⁴ Supra, § 736. See Foster, 255; 1 East P. C. 340; State v. Knight, 48 Me. 11; U. S. v. Cornell, 2 Mason, 91; Com. v. Drew, 4 Mass. 391; Com. v. York, 9 Met. 93; Com. v. Webster, 5 Cush. 290; State v. Zellera, 2 Halst. 220; Resp. v. Bob, 4 Dall. 145; Penn. v. Honeyman, Addis. 148; State v. Town, Wright (Ohio), 75; Davis v. State, 25 Oh. St. 369; Com. v. Hill, 2 Grat. 594; Kriel v. Com. 5 Bush, 362; Mitchell v. State, 5 Yerg. 340; Murphy v. People, 37 Ill. 447; Davison v. People, 90 Ill. 222; State v. Decklots, 19 Iowa, 266; State v. Shippey, 10 Minn. 224; State v. Johnson, 3 Jones (N. C.), 266; State v. Irwin, 1 Hayw. 112; State v. Merrill, 2 Dev. 269;

being held deadly because the instrument is deadly, and the instrument being held deadly because the design is deadly. And in the second place, the use of the term "law" is ambiguous, and is likely to mislead. If it be said that the use of a weapon likely to inflict a mortal blow implies, as a presumption of law, in its technical sense, a deadly design, this is an error; and *a fortiori* is it so when it is said that the use of such a weapon implies a malicious design. There is no such thing, as we have already noticed, as a purely abstract killing; ¹ no killing can be proved in a court of justice except in the concrete, accompanied by such circumstances as enable us, as a matter of probable reasoning, to determine whether the killing was or was not malicious. An executioner, under mandate of law, hangs a convict; here the instrument of death is deadly, but no malice is inferred. In the same category fall by far the greater number of violent deaths which history records; those of persons killed in the due course of legitimate war. On the other hand, when a person without authority, and with the appearance of deliberation, shoots another, we infer, as a presumption of *fact* (not of *law*), design. There is no *petitio principii* in this. We do not say that the killing was designed because it was designed. What we say is this: Taking aim at another with a gun, by a person without authority, and not in public war, and then firing, ordinarily implies an intent to kill; this was a case of such firing without authority; therefore this implies an intent to kill. Or, to vary the incidents: for a strong man, in possession of his senses, persistently and violently to kick a child on its vital parts can only be explained on the hypothesis of malice; this was such a case; therefore this case can only be explained on the hypothesis of malice. Or, again: to lock a child up in a room and knowingly to leave him without food for a week implies malice; this the defendant did; therefore, in this case, malice is to be inferred. We cannot, in this case, leave out the word "knowingly;" for such a locking up might be accidental, in

State v. Bowman, 80 N. C. 426; State v. Peters, 2 Rice's Dig. 106; State v. Smith, 2 Strobb. 77; Clements v. State, 50 Ala. 117; Eiland v. State, 52 Ala. 322; Hadley v. State, 55 Ala. 28; Woodsides v. State, 2 How. Miss. 656; Green v. State, 28 Miss. 689; Riggs v. State, 30 Miss. 687; Dixon v. State, 13 Fla. 636.
¹ See supra, §§ 10, 734-7-8.

which case there would be no inference of malice. Yet "knowledge" in such a case is not a presumption of law, but an inference of inductive reasoning, to be drawn from a series of facts. It is incorrect, therefore, to tell a jury that malice, when the weapon is deadly, is a presumption of law. But while telling them that whether there is or is not malice is a point to be determined by a scrutiny of all the facts in the case, it is proper to remind them that there are certain rules of probable reasoning which it is right for them to keep in view. And one of these rules is that when a responsible person, without authority, and under such circumstances as indicate deliberation, without apparent provocation or necessity, wounds another in a vital part with a deadly weapon, then malice is to be inferred.¹

¹ See, as authorities bearing on this topic, *R. v. Noon*, 6 Cox C. C. 137; *R. v. Selten*, 11 Cox C. C. 674; *R. v. Welsh*, 11 Cox C. C. 336; *R. v. Ward*, L. R. 1 C. C. 356; *U. S. v. Cornell*, 2 Mason, 91; *U. S. v. McGlue*, 1 Curtis C. C. 1; *U. S. v. Mingo*, 2 Curtis C. C. 1; *U. S. v. Armstrong*, 2 Curtis C. C. 446; *Com. v. York*, 9 Met. 93 — *Wilde, J., diss.*; *Com. v. Webster*, 5 Cush. 290; *People v. McLeod*, 1 Hill (N. Y.), 377; *People v. Clark*, 3 Selden, 385; *People v. Sullivan*, *Ibid.* 396; *People v. Kirby*, 2 Parker C. R. 28; *Thomas v. People*, 67 N. Y. 218; *State v. Zeller*, 2 Halst. 220; *Resp. v. Bob*, 4 Dall. 146; *Penn. v. Honeyman*, *Addis.* 148; *Penn. v. McFall*, *Ibid.* 257; *Penn. v. Lewis*, *Ibid.* 282; *O'Mara v. Com.* 75 Penn. St. 424; *Lanahan v. Com.* 84 Penn. St. 80; *State v. Roane*, 2 Dev. 58; *State v. Merrill*, 2 Dev. 269; *State v. Johnson*, 3 Jones (N. C.), 226; *State v. West*, 6 Jones (N. C.), 505; *State v. Smith*, 2 Strobb. 77; *Clarke v. State*, 35 Ga. 75; *Fraser v. State*, 55 Ga. 325; *Holland v. State*, 12 Fla. 117; *Seaborn v. State*, 20 Ala. 15; *Clem v. State*, 31 Ind. 480; *Bradley v. State*, 31 Ind. 492; *Miller v. State*, 37 Ind. 432; *Murphy v. People*, 37 Ill. 447; *Hurd v.*

People, 25 Mich. 405; *Weller v. People*, 30 Mich. 16; *State v. Decklotta*, 19 Iowa, 447; *State v. Hoyt*, 13 Minn. 182; *Anderson v. State*, 3 Heisk. 86; *Seals v. State*, 3 Bax. 459; *McAdams v. State*, 25 Ark. 405; *Wray, ex parte*, 30 Miss. 673; *Jeff v. State*, 39 Miss. 593; *Barcus v. State*, 49 Miss. 17; *State v. Evans*, 65 Mo. 574; *State v. Alexander*, 66 Mo. 148; *Isaacs v. State*, 25 Tex. 174; *People v. Barry*, 31 Cal. 357; *State v. Bertrand*, 3 Oregon, 61. As sustaining the text, see *State v. Wingo*, 66 Mo. 181, where it was held error to charge the jury that the law presumes from wilful killing murder in second degree, and that the burden of exculpation is on the defendant. See *supra*, § 721. To same effect see *Ferris v. Com.* 14 Bush, 362.

In *U. S. v. McClare*, 17 Bost. Law Rep. 439, the case consisted simply of proof of a blow struck. "The mere fact," say the court, "of a blow struck does not make out a crime. In charging a crime, the government charges a criminal intent, and must prove it. Proving a blow may in some cases be sufficient evidence of a criminal intent, but such intent may be repelled by the circumstances. If on all the

§ 765. When it is alleged that a death was produced by a particular instrument, the condition of the instrument becomes a pertinent subject of inquiry. Is a knife, for instance, with which it is alleged a homicide was

Inference
from con-
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weapon.

evidence the jury are left in reasonable doubt as to the intent of the defendant, they cannot convict him of the crime." To same effect see *King v. State*, 45 Ind. 518, and cases cited *supra*, § 671.

We may notice in this connection the following remarks by Christiancy, J., in his opinion in *Maher v. People*, 10 Mich. 212:—

"To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offence as the act which causes the death. Without the concurrence of both, the crime cannot exist; and as every man is presumed to be innocent of the offence of which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offence, to the malice as well as to the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof as to each rests equally with the prosecution, though the one may admit and require more proof than the other, — malice, in most cases, not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it is done." See also *Coffee v. State*, 3 Yerg. 283; *Floyd v. State*, 3 Heisk. 342; *Hamby v. State*, 36 Tex. 523, and cases cited *supra*, §§ 734 *et seq.*

Judge Grover, in *Stokes v. People*, 53 N. Y. 164, delivering the unani-

mous opinion of the Court of Appeals, said:—

"It can hardly be supposed that, under such proof as to what the circumstances really were, the judge intended to charge the jury that the law implied the crime of murder from proof of killing under the circumstances of the case, and upon such proof such an instruction would have been erroneous. The instruction in effect was, and the jury must so have understood it, that the law implied motive, and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter or excusable homicide.

"But for the idea conveyed by the part of the charge excepted to, that the law implied the crime of murder in the first degree from the proof of killing only, unless the prisoner satisfied them it was not murder, the benefit of the doubt to be given to the prisoner would not have been restricted to their finding the evidence evenly balanced, so that they did not know where the truth lay; on the contrary, the instruction would have been not to convict of that crime, unless convinced by all the evidence in the case that he was guilty, and that if a careful examination of all the evidence left in their minds reasonable doubts of his guilt, they should give the prisoner the benefit by an acquittal."

This is sound law, in conformity with what is stated in the text. At the same time, we must repeat that

committed, marked in such a way as to indicate use of the character assigned? ¹ When suicide was set up as the cause of the Earl of Essex's death, in 1683, it was a strong point against this hypothesis that the razor with which the fatal wound was inflicted was notched by the act of drawing it across the neck-bone in a way very unlikely to have resulted if the deceased had himself inflicted the wound. In cases of hanging, the condition of the rope is material; and so in poisoning is that of the vessel in which the poison was contained.²

§ 766. In the case of Courvoisier, who was tried for the murder of Lord William Russell, there were two facts relied upon to repel the hypothesis of suicide. One was that a napkin was placed over the face of the deceased, and

Inference
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while it is essential to maintain that intent is an inference of fact, to be drawn by the jury from all the circumstances of the case, it is important that questions of this kind should not be left to the jury without such instructions from the judge as will lead them to make correct inferences. They should be reminded that all acts committed by intelligent persons are to be canvassed by the tests of practical logic as applied by us to the transactions of every day life; that intent is not proved substantively, but inferred from acts and declarations; and that though the jury have to determine this question, they must be guided by the ordinary rules of inductive reasoning. And they should be also told (and in this respect the opinion just quoted falls short), that presumptions of fact of this kind are as much *proof* as are any other part of the evidence of the case, and are to be taken into consideration as part of the case when the jury apply the test of reasonable doubt.

To same effect see *Floyd v. State*, 3 Heisk. 342; and see remarks of Judge Wells in *Com. v. Sturtivant*, Appendix to Whart. on Hom. See also *Kingen v. State*, 45 Ind. 519.

In *Com. v. Sturtivant*, 117 Mass. 139, it was said by Endicott, J. : —

"The remaining exception was to the evidence that the defendant in chopping wood used the axe with his right hand forward. It does not appear how this testimony applied to the case, and, therefore, the bill of exceptions fails to show that its admission was erroneous. If, as is to be presumed, it appeared in evidence that the fatal blows upon the deceased were inflicted by a weapon used with the right hand forward, it was competent to prove that the defendant so used his axe when chopping wood. It is like the ordinary case, where a blow is apparently inflicted by a left-handed person, it is competent to prove that the accused is left-handed. It does not prove that he struck the blow, but it is a circumstance pointing to him as belonging to a class by one of whom the blow was struck, and, in connection with other inculpatory testimony, is competent." *Infra*, § 773.

A jack-knife is not necessarily a dangerous weapon. *Com. v. O'Brien*, 119 Mass. 342.

¹ See *Papenburg's case*, cited *supra*, § 762.

² See 2 Wh. & St. Med. Jur. 3d ed. §§ 718 *et seq.* Compare *infra*, § 774.

the other that the instrument of death did not lie near the body.¹ To the same point is the case of Jane Norkott, who was found dead in her bed with her throat cut, while a bloody knife was found sticking in the floor some distance from the bed, and as it stuck the point was turned toward the bed and the haft from it. Yet in such case the jury must be satisfied that the body was not moved between the death and the period of observation. Thus Mr. Taylor² tells us of a case of homicide in which the "weapon, a razor, was found under the left shoulder; a most unusual situation, but which, it appears, it had taken owing to the body having been carelessly turned over before it was seen by the surgeon first called."³ That the weapon is firmly grasped in the deceased's hand strengthens the inference of suicide.⁴ When it is placed in the hand after death, it is held loosely. That the instrument (*e. g.* a razor) was *closed* is not conclusive against suicide.⁵ It should also be kept in mind that the weapon found near the person of the deceased may not be the one with which the crime was committed.⁶

§ 767. Dress, independently of the questions to be hereafter noticed, adds often an important element of indicatory proof. Thus in a case cited by Taylor,⁷ there were two cuts in a shirt produced in evidence. These cuts were near each other, and precisely similar; leading to the inference that the knife producing them went through two folds of the shirt. From this, however, it followed that the shirt could not have been on the deceased at the time of the wounding, since if it had been there would have been *three* not *two* cuts. So, on the trial of Stokes for the murder of Fisk, in 1873, the condition of the deceased's cloak, immediately after the wound, was admitted to show the force and direction of the shot. The lay of blood-stains, also, may indicate the direction in which the blood flowed.⁸ Nor is it necessary, it has been ruled, that the

¹ 2 Beck Med. J. 86.

² Med. Jur. by Reese, 284.

³ See 2 Whart. & St. Med. Jur. 3d ed. § 722.

⁴ 2 Whart. & St. Med. Jur. 3d ed. § 722. See Taylor's Med. Jur. by Reese, 284. *Infra*, §§ 776, 781.

⁵ See case reported in Whart. & St. Med. Jur. § 722.

⁶ See cases given in Wills' Circum. Ev. p. 112.

⁷ Taylor's Med. Jur. by Reese, p. 274.

⁸ Com. v. Sturtivant, 117 Mass. 122. *Infra*, § 778; Leontade's case, *infra*, § 776.

garments in question should be themselves produced.¹ Their condition can be described by witnesses without such production, if their non-production is satisfactorily explained.² But if practicable they should be secured and brought into court, though before admitting them there should be evidence that they have not been tampered with since the commission of the crime.³

§ 768. If, however, the instrument of death has been found, and homicide is suspected, the inquiry becomes important, To whom does it belong? In order to ascertain the ownership, it will be necessary to examine the weapon itself carefully for any name or other mark by which it may be identified, and to inquire who possessed such a weapon; whether any one purchased or procured one of the kind a short time before the murder was committed;⁴ whether any one was observed preparing it for use; whether there are any marks upon it to indicate the hand, or the size of the hand, in which it was

¹ As to inspection see *supra*, §§ 311 *et seq.*

² *Com. v. Pope*, 103 Mass. 440. See *supra*, §§ 163-7; *infra*, § 778.

³ See *Com. v. Twitchell*, 1 Brewst. 561, cited fully *infra*, §§ 774, 777.

Mr. Wills (*Wills on Circumstantial Evidence*, 5th Am. ed. pp. 119, 120) says:—

“Identification is often satisfactorily inferred from the correspondence of fragments of garments, or of written or printed papers, or of other articles belonging to or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise related to the *corpus delicti*, or by means of wounds or marks inflicted upon the person of the offender. A woman who was tried for setting the prosecutor’s ricks on fire had been met near the ricks about two hours after midnight, and a tinder-box was found near the spot containing some unburnt cotton rag, as also a piece of the woman’s neckerchief in one of the ricks where the fire had been ex-

tinguished. The piece of cotton in the tinder-box was examined with a lens, and the witness deposed that it was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner’s box at her lodgings; that a neckerchief taken from a bundle belonging to the prisoner, found in her lodgings, corresponded with the color, pattern, and fabric of the piece found in the rick, and that they had both belonged to the same square; and from the breadth of the hemming, and the distance of the stitches on both pieces, as well as from the circumstance that both pieces were hemmed with black sewing silk of the same quality (whereas articles of that description were generally sewed with cotton), he clearly inferred that they were the work of the same person. The prisoner was capitally convicted, but there being reason to believe that she was of unsound mind, she was reprieved.”

⁴ See *Nichols v. Com.* 11 Bush, 575. As to instruments as preparations see *supra*, § 753; *infra*, § 799.

held, or the direction in which the fatal blow was given ; whether the weapon is imperfect or broken, and if so, who has been observed in possession of a fragment corresponding to the broken portion.¹

§ 769. In ordinary cases the shape of the wound will agree with the instrument with which it has been produced.

This is particularly the case with wounds inflicted by a knife, a dirk, a sword, or a razor, or, in general, by any sharp weapon by which a cut or thrust may be made. If, however, death has been produced by a bruise or contusion,² the case presents more difficulty, as it not unfrequently happens that such wounds are unaccompanied with any mark of external violence. In most cases even of this class, however, a careful investigation will lead to the discovery whether the instrument

Inference
from
wound.

¹ After a death was produced by a dirk knife, the possession of such a knife was traced to the prisoner on the day of the homicide, and on the next morning, the handle of a knife, with a small portion of the blade remaining, was found in an open cellar near the spot. Afterwards, upon a *post-mortem* examination of the deceased, the blade of a knife was found broken in his heart. Some of the witnesses testified to the identity of the handle as that of the knife previously in possession of the accused, but there was no evidence to the identity of the blade. The question remained, therefore, whether the blade belonged to the handle ; and when these pieces came to be placed together, the toothed edges of the fracture exactly fitted each other, leaving little doubt that they had belonged together, because, from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would precisely match. Whart. on Hom. § 768. An analogous instance is mentioned of a trial before Lord Eldon of mur-

der with a pistol. The surgeon had stated in his testimony that the pistol must have been fired near the body, because the body was blackened, and the wad was found in the wound. It being asked by the judge if he had preserved that wad, he said that he had, but had not examined it ; on being requested so to do, he unrolled it carefully, and on examination it was found to consist of paper, constituting part of a printed ballad ; and the corresponding part of the same ballad, as shown by the texture of the paper and purport and form of stanzas of the two portions, was found in the pocket of the accused, and tended to fix him as the person who loaded the pistol. And in a homicide trial in Massachusetts in 1874 (*Com. v. Sturtivant, Whart. on Hom. Appendix*), a stake by which the murder was effected was connected with the defendant by evidence that the stake fitted into a particular cart belonging to him.

² See 2 Wh. & St. Med. Jur. 3d ed. § 694 ; *Gardiner v. People*, 6 Parker C. R. 155. *Supra*, § 765.

were blunt or sharp, of wood or of metal, whether the blows were repeated, and whether they were sufficient to cause death.

§ 770. If the wound has been produced by a gun or pistol, it becomes necessary to inquire whether it was received from a person near at hand, or at a distance. Marks on the body of the deceased may afford indications of the distance of the assailant at the time of the attack. If there are marks of powder on the deceased, a near attack may be inferred.¹

§ 771. The line followed by a wound may afford a basis from which the place from which it was aimed may be inferred.² But evidence of this kind must be received with extreme caution. Thus, in an interesting case tried in Texas, in 1873,³ the evidence was that Saunders, who was a hired servant of Huffhines, was in the habit of getting up in the night to look after the horses in his care. On the night of the homicide he pretended to suspect that some interloper was prowling about the premises, and he called the deceased to go out with him to

¹ See 2 Wh. & St. Med. Jur. § 697. Of the effect with which such evidence may be used, an illustration is given by a case some years ago in Ireland. Taylor's Med. Jur. 330. The question was, whether in a scuffle a pistol had accidentally gone off and occasioned the death, or whether the assailant had deliberately fired at him from some distance. The sons of the deceased swore that the pistol was fired from some distance, the prisoner taking deliberate aim. This was confirmed by the dying declaration of the deceased. But on a careful examination of the body, which was disinterred for that purpose, the surgeon was enabled to swear positively that the pistol must have been fired close to the body of the deceased, as there distinctly appeared the marks of powder and burning on the wrist. So conclusive was this evidence deemed, that the prisoner was acquitted, and the parties who had appeared as witnesses against him were indicted and con-

victed of perjury. As to marks of powder see case cited supra, § 769.

² Where the deceased was shot in the street, when looking at a parade, and where the question was whether he was killed by a stray shot, or by a gun which there was some evidence to show was aimed from a third story window, the doubt was solved by the slanting direction of the wound. 2 Wh. & St. Med. Jur. (3d ed.) §§ 689-702; Watson on Hom. 276. The same point was made in another case, stated by Watson, where the prisoner was tried for shooting a man who came to his house under suspicious circumstances. The defence was that the ground being rough and slippery, the prisoner stumbled, and both barrels of the gun had gone off by accident. This statement was confirmed by tracing the direction of the shot in the body of the deceased, which was found to be pointed upwards. Watson on Hom. 276.

³ Saunders v. State, 37 Tex. 710.

look. He had a pistol; and when they were a short distance from the house, the deceased was killed by a shot from the pistol in the hands of the defendant. The defence was that the shot was accidental; that the deceased, at the time of the shooting, was walking before the defendant; that the defendant had cocked his pistol, and was trying to let the hammer down, holding the pistol in his hands, at an angle of about 45° ; that the hammer slipped from under his thumb, causing an accidental discharge of the pistol, the ball penetrating, as he supposed, the deceased's back. In point of fact, however, the ball entered the head of the deceased, about the base of the occipital bone, proceeding about two inches in a downward range towards the chin. Experts were produced to contradict the defendant's statement by showing that it was irreconcilable with the course actually taken by the ball. The defendant was on this evidence convicted and sentenced to death; but in the Supreme Court the judgment was reversed and a new trial ordered.¹ Nor can the

¹ "The State," said Walker, J., "has adopted a theory, favored by the evidence of professional witnesses, inconsistent with the statements of the appellant, which appears to be predicated (to postulate?) that the direction of the ball, after it entered the head of the deceased, must necessarily have followed the prolongation of a straight line from the point at which it was discharged from the pistol. This theory, if true, to account for the depression in the line of direction pursued by the ball, after entering the man's head, would establish the fact that the ball must have been fired from a point higher than the head of the deceased, which might, perhaps, involve the case in speculation, if not in absurdity. At all events, it is inconsistent with the idea that the pistol was held in the ordinary position in which such weapons are held when aimed at an object, if the theory of the State be correct. But, after having examined some authorities of very high standing on gunshot wounds, and particu-

larly the reports of surgeons employed in the field and base hospitals during the late war in the United States, *we are perfectly satisfied that to whatever degree of perfection the noble science of surgery may have been brought, no rules have ever been laid down or attempted to establish the geometrical direction of war missiles after entering the human body.*" . . . "There are plenty of living men who could, upon their own bodies, illustrate the erratic and utterly uncertain direction of gunshot wounds, by a simple reference to the wound of entrance and the wound of exit. A ball passing through the atmosphere under a diminishing force will be deflected more easily than one flying with the full velocity of its exit from the muzzle of the piece from which it is discharged. Many instances are found where partially spent balls, entering merely the muscular parts of the human body, have traversed a line varying many degrees from the line upon which they entered the body. The most remarkable and singular results

conclusion reached by that tribunal, that the evidence was not sufficient to sustain a conviction, be disputed. No absolute rule can be laid down as to the precise course taken by a ball when entering a human body. The line it takes when resisted varies with the calibre of the ball, and the quality and quantity of the powder; and it is deflected by obstacles which seem very slight.¹

are often witnessed where leaden balls come in contact with the tough sinewous cartilages or ossified parts of the human body. Nevertheless it is true that the conical balls used in modern warfare, when passing through a line of any direction with great velocity, and brought in contact with substances of less density, will pass forward on a straight line for a short distance, unless the form of the object be such as to exert an unequal resistance on the striking surfaces. We feel sure we are authorized in these remarks by the experience and scientific observation of every author who has treated the subject, and especially those who have written from personal observation. We do not feel authorized in a legal opinion to enter at length into mere scientific speculations. But we think in this case we are called on to deduce from science as far as it goes, and from known facts and principles, whatever can be so legitimately deduced in favor of innocence and human life."

In Billings's case, 18 Alb. L. J. 261, it was "shown by very reliable experts, mechanical, medical, and scientific, that a bullet found in the head of deceased, and which caused her death, was very much lighter than any of those usually fired from guns of the kind found in the well; that one of the latter bullets could not have lost sufficient weight in its progress after being fired to reduce it to the size of the one found; and that a bullet fired from the gun at a point near enough to discolor the glass of the window with

burning powder, as was done in this case, would have passed entirely through the head of the deceased instead of lodging in it."

In *People v. Smith*, California Supreme Court, October, 1879, 4 Pacific C. L. J. 213, "it was held that testimony having been given to the effect that the course of the pistol ball through the body of the deceased was direct from the point of its entrance to the point where it was found, it was error to permit the prosecution to ask the opinion of a medical witness, as an expert, as to the relative positions of the deceased and the defendant at the time when the defendant fired the shot, the object being to show that the prisoner stood on higher ground than the deceased." The court said: "The subject matter of the inquiry is not one requiring any peculiar scientific study or skill. An ordinary juror is as competent to determine the relative positions of the parties as the most skilful physician or surgeon; and such being the case, the prosecution was not entitled to the opinion of the witness, as a medical expert, as evidence in the case. All the authorities so hold. See 1 Greenl. Ev. § 440, and cases cited. There is nothing in the nature of the subject of the inquiry which would enable a physician, however skilful, to give an opinion of any greater value than that of a man skilful in any other profession. In other words, the solution of the question does not require professional or scientific skill." 20 Alb. L. J. 423.

¹ See this illustrated in 2 Wh. &

In respect to the direction of incised and punctured wounds greater accuracy of conclusion, as is elsewhere shown, can be reached.¹

§ 772. In incised wounds an inference may be drawn from the skill of infliction. A person acquainted with anatomy is likely, if the object be to kill, to strike at a vital part; and hence, when a wound is skilfully directed to such a vital part as an ordinary observer would not be acquainted with, special knowledge of the subject is inferred. So, in an English case, a wound was traced to a butcher from the fact that it was inflicted in the way used by butchers in killing sheep.²

§ 773. Left-handedness has sometimes been resorted to for the purpose of connecting the defendant with the offence charged; and at all events, if the wound is shown to have been effected by a person who was right-handed, it is a ground of defence that the defendant was left-handed, and there may be a slight inculpatory inference, in case of a left-handed wound, drawn from the fact that the defendant was left-handed.³

§ 774. Whether a particular wound could have been produced by a particular instrument, is a question as to which the opinion of experts can be asked.⁴ The opinion of an expert as to which of two wounds, either of itself

Skill of wound.

Left-handedness.

Adaptation of instrument to wound.

St. Med. Jur. 3d ed. § 712; and see, as bearing on this point, *State v. Morphy*, 33 Iowa, 270; *State v. Porter*, 34 Iowa, 131.

¹ See 2 Wh. & St. Med. Jur. 3d ed. § 719.

² Taylor's Med. Jur. by Reese, 277.

³ See Taylor's Med. Jur. by Reese, 279; *R. v. Phillips*, Woodhull's Trials, 80; Wills Circum. Ev. 97. Where Sellis, a servant of the Duke of Cumberland, was found in his bed killed by a razor, the question of suicide or homicide (in which there was an attempt to implicate the duke) arising, the hypothesis of suicide was said at first to be sustained by the fact that the razor was found on the left side of Sellis's bed. This was met by proof that Sellis was ambidextrous. Ibid.

That it is competent to prove right-handedness see *Com. v. Sturtivant*, 117 Mass. 139, cited supra, § 765.

⁴ Supra, § 412; *Com. v. Lenox*, 3 Brewst. 249; *Davis v. State*, 28 Md. 15; *State v. Morphy*, 33 Iowa, 270; *State v. Porter*, 34 Iowa, 131; though see *Wilson v. People*, 4 Parker C. R. 619. In *Com. v. Twitchell*, 1 Brewst. 566, the defendant called Dr. Gross, and showed to the witness the poker given in evidence by the Commonwealth. The witness said: I have made experiments to ascertain the facility of breaking a human skull with a poker. This is like the poker I saw in the grand jury-room. The following question was then put: State the result of your experiments. To the district attorney: My experiment was not made

necessarily fatal, actually caused the death of the deceased, is competent evidence.¹ And the possession by the defendant of

with this poker, nor on the body of Mrs. Hill.

The defendant then offered to show "that the poker offered in evidence by the Commonwealth could not inflict the wounds on Mrs. Hill's skull; that the witness had read the reports of the testimony of Dr. Shapleigh, and that in his opinion this poker could not inflict those wounds."

This was objected to, and argued.

Brewster, J. "The offer of the defendant to show that, in the opinion of this witness, the poker could not have produced the wound, should be admitted. His experiments with another poker on another skull should be excluded."

Ludlow, J. "I concur. In *Champ v. Commonwealth*, 2 Metc. (Ky.) 27, the Court of Appeals said: 'It is agreed on all hands that such opinions, to be admissible, must always be predicated upon and relate to the facts established by the proofs in the case. Mere professional opinions upon abstract questions of science, having no proper relation to the facts upon which the jury are to pass, evidently tend to lead their minds away from the true and real points of inquiry, and should therefore always be excluded.'"

Subsequently the following question was put to the witness: "Have you been experimenting with a similar poker upon a human skull? If so, state the result of the experiment." This was objected to. The objection was sustained. The defendant excepted. The following opinion was given by the court (Brewster, J.) in overruling the exceptions: —

"The 20th and 21st reasons assign

as error the rejection of 'an opinion' of a medical expert 'based upon experiments recently made,' 'and the result of said experiments.' If a jury can be bewildered by such confusions of science, we might as well abolish the form of jury trial. A woman is found murdered. Near her body lies a poker stained with blood, and adhering to it is a human hair corresponding in color to the hair of the deceased, and shreds of wool. A respectable physician describes her wounds, and says, in substance, that one of the fractures and a number of the cuts could have been caused by the poker. Now when an accused person offers to show that the stains are not blood — that the hair is not human, or not from the head of the deceased; that the shreds are not wool or not from her cap — or that, in the opinion of medical experts, the instrument found would not cause those wounds, he follows directly in the line of the Commonwealth's evidence. This prisoner chose only to pursue the last line of defence. The others, however, were all open to him. But he wished to go further: to do what never has been permitted before in the face of an objection. He proposed to show that some other arm than the defendant's could not with some other poker than that in evidence inflict such wounds upon some other skull. Of what avail was all this? The weapons, arm, and skull were confessedly different. The experiment must have been made on the skull of a corpse. These blows were inflicted upon the head of a living person. The expert must have handled a poker with the view to experi-

¹ *Eggler v. State*, 56 N. Y. 642. *Supra*, § 412.

an instrument fitted to produce abortion is evidence against him on a trial for producing the abortion.¹

§ 775. An examination of a number of reported cases of sui-

ment. The guilty actor in this scene had a motive which might give far greater power to his blow than any force that could be invoked by mere philosophy teaching by example.

"But aside from all these refinements, the offer contradicted nothing. A physician, in one of our criminal trials, swore that the defendant's knife could not produce the wound found upon the throat of the deceased. During the recess, the then district attorney, now of counsel for the accused, directed another surgeon to make the experiment; and the last expert was able to contradict the first by swearing that the weapon had in his hands actually made a still greater wound, and had decapitated a corpse. In *Commonwealth v. Geisenberger* (Oyer and Terminer, Philadelphia, Dec. term, 1858, No. 679), a very respectable physician swore that the blow from the defendant's fist could not have broken the skull of the deceased. A piece of the bone was, however, produced, and it was almost as thin as tissue-paper. Dr. Parkman's skull was fractured with a grape-vine stick. Bemis's Rep. 566.

"In *Champ v. Com.* 2 Metc. (Ky.) Rep. 27, cited by Judge Ludlow upon the trial, Judge Duvall, delivering the opinion of the Court of Appeals, said: 'It is agreed on all hands that such opinions (of experts), to be admissible, must always be predicated upon and relate to the facts established by the proofs in the case. Mere professional opinions upon abstract questions of science, having no proper relation to the facts upon which the jury are to pass, evidently tend to lead their minds away from the true

and real points of inquiry, and should therefore be excluded.'

"There is, therefore, nothing in this reason which entitles it to consideration as a question of law. As matter of fact, the defendant cannot stand upon it, for his witness stated that he did 'not think any poker of this material could have inflicted the wounds, because it is not misshapen sufficiently; it could not have been used four times without bending. . . . It is possible to break the temporal bone with the angle of this poker, and to drive the tongue through the fractured skull. There is authority for the assertion that a penetrating wound can be made by a poker. A repetition of the blows would break the bones more.' Dr. Maury stated that he thought 'it extremely doubtful that the wounds could have been inflicted with this instrument, and we see it as it is. . . . It is possible to make a punctured fracture at the temple with that poker; it would be possible to make a lacerated wound with the poker; undoubtedly the whole skull could have been beaten into small pieces with that poker; it depends on the velocity of each blow, and the rapidity with which they are repeated; the temporal bone could have been broken with the heel of the poker, and then the tongue drawn in; have known a skull to be fractured with an umbrella; it was drawn into the skull above the eye.'" The ruling in this case, it must be remembered, was virtually sustained by the Supreme Court of the State, that court refusing to grant an *allocatur* for a review.

¹ *Com. v. Blair*, 126 Mass.

cide leads to the conclusion that the object of the self-destroyer is to produce death by a single blow; that if he uses a cutting instrument, he selects the throat; if he stabs himself he selects the chest, particularly the heart or belly; and if he shoots himself he generally does it through the head.¹ It therefore becomes a subject of legitimate investigation whether or not the wounds are in a position likely to have been selected by one seeking instantaneous self-destruction, and who would be inferred to have designed to strike at what he conceived to be the most accessible vital part.²

§ 776. It is important to inquire, in cases where the defence of suicide may be started, whether there are marks upon the person other than those made by the fatal wounds; *e. g.* whether the hands or arms have the appearance of having been held forcibly during the commission of the deed; whether the head appears to have been bruised, as if the victim were first rendered insensible by a blow upon that portion of the frame; whether the wound is in a position that could not have been reached by the deceased, and which may often be ascertained by placing the weapon in the hand of the corpse, and observing whether or not the direction of its probable course corresponds with that of the wound.³ It must be considered, also, whether there are signs of the presence of another, as in the case of a woman found dead in a room with her throat cut, and a large quantity of blood on her person, while on the floor the presence of another person in that room was plainly indi-

¹ See Wh. & St. Med. Jur. 3d ed. §§ 702 *et seq.*; Watson on Homicide, 276.

² Compare the case of the Duchess of Praslin, reported in Ann. d'Hyg. 1847, tit. 2, p. 377, and a case where a husband inflicted on his wife fifty-six wounds, reported in Taylor's Med. Jur. by Reese, 281.

So, too, the variety of the wounds will often sufficiently indicate the fact of murder. William Corder was tried at the Bury St. Edmund's Summer Assizes for the murder of Maria Marten, whose body was discovered in a barn twelve months after her disap-

pearance. He alleged that she had committed suicide; but upon examination of the body a handkerchief was found drawn tightly around the neck; the course of a pistol ball was traced through the left cheek, passing out at the right orbit; and three other wounds were found, one of which had entered the heart, and all of which had been made by a sharp instrument, means of death so various and unusual with females as to discredit entirely the statement of the prisoner, and lead to his conviction and execution. Wills Cir. Ev. 169.

³ See *infra*, § 781; *supra*, § 766.

cated by the print of a bloody left hand on the left arm of the deceased.¹ All stains or marks of dirt on the person or dress of the deceased should be carefully scrutinized.² In the famous case of Leontade, where a young girl, after having been ravished, was killed, her dress was partially identified, and that of her murderer connected with it, by the fact that on both of them were found traces of evacuations, which took place during the violence committed on her, which evacuations contained the seeds of figs of which she had previously copiously eaten.

The *hands* of the deceased should be examined for the purpose of seeing whether they exhibit any traces of attack or defence.

The *mouth* and *throat* of the deceased, if sleeping at the time of the attack, may have been compressed by the murderer to prevent an outcry; and of this the body may subsequently exhibit signs.³

In cases of alleged rape, proof of bruises on the person of the prosecutrix are admissible.⁴

§ 777. *Traces of blood* in cases of homicide, near the corpse or in the way leading to or from it, or marks or spots of blood upon the person or clothes of the accused, should be carefully examined with a view to the solution of any or all of the following inquiries: (1.) Were the wounds self-inflicted, or the act of another? This may in some cases be determined by the fact that blood is visible in spots or pools in places where it could not have been if the death had been the result of suicide; or where there is no communication between the blood on the floor and the corpse; as if the body had been removed by another from the spot on which the deed was committed.⁵ (2.) Was the deceased erect or lying down when the wounds were received? It will throw much light on this question, as will be presently again noticed, if the spots of blood on

Inference
from blood-
stains.

¹ Case of Mary Norkot and others, 14 How. St. Tr. 1324.

² State v. Kingsbury, 58 Me. 239, cited supra, § 27.

³ As to inferences from stains on body see Wh. & St. Med. Jur. 3d ed. § 697.

In a remarkable case in Missouri, the bones of the deceased were brought

into court for the purpose of explaining his position during the encounter.

Wiener v. State, 66 Mo. 13. For other cases of inspection see supra, §§ 311 et seq.

⁴ State v. McLaughlin, 44 Iowa, 83.

⁵ Infra, § 778.

the adjoining wall, or any other erect body near the locality, be examined, as the direction from which they came may frequently be determined from the manner in which they have spattered. It is important, also, to search for prints of bloody hands and impressions of bloody feet, which may give information as to the direction taken by the murderer after the commission of the act. Care should be taken, however, not to create *indicia* while searching for them.¹

§ 777 a. Scarcely a case arises where this issue is material in which experts have not appeared ready to identify dried blood as human, and by this process to supply a link on which a conviction of a capital offence may be made to rest.² It is perhaps a minor matter that in this way enormous expenses are heaped not only on the State but on the accused. Experts are brought from a dis-

Human
blood can-
not be dis-
tinguished
beyond
reasonable
doubt from
other
blood.

¹ *Infra*, § 778. See this subject discussed fully in 2 Wh. & St. Med. Jur. 3d ed. §§ 724 *et seq.*

A young man was found dead in his bed, with three wounds in the front of his neck. The physician who was first called to see him had, unknowingly, stamped in the blood with which the floor was deluged, and had then walked into an adjoining room, passing and repassing several times. The consequence was that suspicion was raised against a party who narrowly escaped being committed to take his trial for murder. It subsequently turned out to be a clear case of suicide. 1 Tayl. Med. J. 372; and see *Com. v. Sturtivant*, Appendix to Whart. on Hom.; 117 Mass. 122.

² On the trial of Leavitt Alley, in Boston, 1873, elsewhere adverted to, the question whether dried human blood can be distinguished from horse blood was largely discussed by experts. Although there was some expert testimony tending to the affirmative, the tenor of the evidence, and that of the subsequent discussion, is, that no positive conclusion can be

reached on the subject. See evidence given in 2 Wh. & St. Med. Jur. 3d ed. § 758.

In *People v. Gonzales*, 35 N. Y. 49, decided by the New York Court of Appeals in 1868, the officer who made the arrest was permitted to testify that he found blood on the prisoner's clothes. The Court of Appeals affirmed this, saying: "Stains of blood found upon the person or clothing of the party accused have always been recognized among the ordinary *indicia* of homicide. The practice of identifying them by circumstantial evidence, and by the inspection of witnesses and jurors, has the sanction of immemorial usage in all criminal tribunals. The testimony of a chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence."

In *Com. v. Twitchell*, 1 Brewst. 561, the course taken by the court in this relation deserves high commendation. It is thus stated in the report: "At the conclusion of the Commonwealth's case, Charles H. T. Collis, Esq., for the defendant, moved that the articles

tance by the State at great cost; protracted experiments are made by them afterwards to be detailed to the jury; and testimony is adduced which the defendant must meet at the peril of

of clothing which the Commonwealth's witness, Dr. Levis, had testified were stained with blood, should be delivered for examination by defendant's experts.

" This motion was argued by counsel on both sides.

" Brewster, J.: The articles identified by the officers as the clothing of the defendant, having been examined by Dr. Levis, and his opinion having been given to the jury as to the results of his examination thereof, the defendant's counsel have moved that the defendant's experts be permitted to examine them in the presence of officers of the court. The district attorney has opposed this motion, stating that he is willing that the examination shall take place as desired, if the name of the defendant's expert is submitted to and approved by the Commonwealth's officer and by the court. The defendant has declined to submit the name of his expert, and has insisted upon his absolute right to have the articles examined when, where, and by whom he pleases, conceding only that the officers of the court may be present. The articles having been exhibited to the jury, and some of them having been handed to the jury, they must be regarded as in evidence. The defendant should have the fullest right of examination accorded to him, consistent with the preservation of the articles from accidental or intentional destruction. If the object is to inspect by the use of glasses, this can be accomplished by examination in open court, or in an adjoining room, in the presence of officers. If the purpose is to secure a chemical analysis, I think the defendant is entitled, as

matter of right, to have such an examination made by any expert he may select; but, to guard against the possible destruction of important evidence, the tests should be applied in the presence of the court.

" Ludlow, J.: A motion having been made by the prisoner's counsel to permit the clothing and other articles which Dr. Levis has examined and identified as being sprinkled, saturated, or smeared with the blood of a mammal, to be examined by some person to be selected by them, but not in the presence of the court, though in the view of an officer or officers to be selected by the court, it becomes necessary to state what, in my judgment, ought to be the practice of this tribunal.

" 1. It is to be noted that the articles in question, except the poker, have not yet been offered in evidence, and they therefore remain in the custody of the Commonwealth's officers. This motion is therefore premature.

" 2. When the articles shall have been offered in evidence, they are placed in the special custody of the court, to be dealt with as justice requires.

" 3. Should the prisoner's counsel then desire them to be examined, the court should see to it that they are guarded from intentional or accidental injury with the most scrupulous care, and they may be examined in open court by any persons selected by the prisoner or his counsel, or if, from necessity, the examination cannot be made accurately in open court, they should be placed in the hands of any respectable chemist or physician to be selected by the prisoner, with the con-

his life. Controvert it he readily may, if he can procure the means, for the great weight of authority, as will presently be seen, is that such identification cannot be accurately determined. But to procure this testimony may be impossible for him, unless the State assume the expense, which it often is either unwilling or unable to do.¹ This amounts to a perversion of justice ; but this is not the chief objection. Supposing experts are obtained so as to fully exhibit to the jury both sides of this vexed question, and the case goes to the jury on their testimony, what then ? Is there not danger that the jury may regard the question as one determined, not by ascertainable physical laws, but by their own discretion, on the authority of particular experts ? It would

sent of the court. They should be properly identified as the very articles offered in evidence by the Commonwealth, before they are delivered to the person who has been selected by the prisoner's counsel, and for this purpose that person should receive them in open court ; and they should then be examined in the presence of an officer or officers of the court.

" The defendant's counsel refusing to submit the names of their experts to the court, it was ordered that all the articles be taken to the grand jury room, on the next Saturday morning at half-past nine o'clock, there to be produced by the district attorney in the presence of the judges, the counsel for the prisoner, and such experts as they might select." As is elsewhere argued, private examinations taken by experts without notice to the other side may be *ex parte* as private affidavits taken without notice to the other side. The proper course is to require due notice of such examination, and to reject the result of the examination, unless such notice were given, and unless the integrity of the thing examined be proved.

Dr. Lionel Beale, than whom on this point there can be no higher authority, thus speaks : —

" In these investigations the skilled witness is often called upon to determine whether a red stain is caused by blood, and if so, whether the blood is that of the human subject or one of the lower animals. The latter of these inquiries is most difficult to answer, if we have to rely on scientific evidence alone. In some instances, although after examination we may feel pretty sure in our own minds as to the real nature of the blood, I can hardly think that in any given case the scientific evidence in favor of a particular blood-stain being caused by human blood will be of a kind that ought to be considered sufficiently conclusive to be adduced, for example, against a prisoner upon his trial. At the same time cases will occur in which a strong presumption may be of value in weakening or strengthening circumstantial evidence which is not perfectly conclusive." Beale's *Microscope in Medicine*, 4th ed. London, 1878, p. 266.

See learned articles by Prof. Wormley, in *Phil. Med. Times* for Oct. 1878, and articles in *Am. Law Register* for May, 1877, and Sept. 1878, and following issues.

¹ See on this point 8 Cent. L. J. 184. *Supra*, § 347.

seem, in view of these dangers, and in view of the more recent explorations of scientists who have viewed the question, not as advocates retained by a particular party, but as dispassionate investigators, that the time has now arrived in which it is the duty of courts to advise juries, in all cases in which it is proposed to rest a conviction on the identification of certain blood-stains as human, that as a matter of fact no such identification can be made out beyond reasonable doubt. That stains look like blood may be proved by expert and non-expert; that they are dried *human* blood can be satisfactorily proved by no one.¹

¹ As cases in which such testimony has been received see *State v. Knight*, 43 Me. 11; *Com. v. Alley*, Boston, 1873, Pamph.; *People v. Lindsay*, Syracuse, 1875, Pamph.; *People v. Gonzales*, 35 N. Y. 49; *Com. v. Gaines*, 50 Penn. St. 319; *People v. Bell*, 49 Cal. 486.

The following is condensed from a valuable article in 10 Cent. Law Jour. (Feb. 1880) 188. For several modifications I am indebted to Dr. Laws:—

“In the recent trial of Hayden, at New Haven, Conn., charged with having murdered Mary E. Stannard, some very interesting and important testimony was delivered by experts in physical science as to the ability of scientists to detect and distinguish human blood by the character of the blood corpuscles. Dr. Treadwell, of Boston, who claimed to have experimented extensively with the microscope in the examination of blood corpuscles, was of opinion that he could distinguish human blood from the blood of any or all other animals by the size and form of the corpuscles; while Dr. Woodward, of the United States army at Washington city, and one of the most distinguished microscopists of our age, was very confident that human blood could not be distinguished from the blood of certain

animals of the mammalian species, by the measurement of the blood corpuscles with the aid of the microscope. Other distinguished scientists testified in the case touching the point involved in the opinions expressed by the gentlemen named. The conclusion to be drawn from the testimony of all those experts is, that by the appearance and measurement of the corpuscles under the microscope, blood can be distinguished from all other substances, but that human blood cannot be identified and distinguished with any degree of certainty from the blood of certain of the lower animals, either by microscopical measurement, or by chemical analysis, or by any other test now known to the scientific world. A similar conclusion was reached by our distinguished scientists, professors of physiology and chemistry, in the University of Missouri, not so much, however, from personal experiments as from an examination of standard authorities upon the subject, as will appear from the official correspondence had between Governor Phelps and Dr. Laws, President of the State University, in July, 1879, in reference to a case then pending in the Clark County Circuit Court, against one William Young for the alleged murder of the Spencer family. It seems that a question was raised in the case as to

§ 778. Assuming, however, that it cannot be absolutely proved that certain patches of dried blood are human, it by no means follows that evidence of such blood is inadmissible. So far from such being the case, the existence of blood-

whether certain blood-stains on defendant's clothing were from the blood of a human being or from an animal, and this query induced a thorough examination of the subject by the distinguished gentlemen in the State University, and through the kindness of Dr. Laws we have had the pleasure of reading the result of their investigations as given by them to the governor in response to his letter to Dr. Laws. . . . We append herewith the communications in question: I. Letter from Dr. Laws to Judge Kelley; II. Letter from Governor Phelps to Dr. Laws; III. Reply of Dr. Laws to Governor Phelps; IV. Letter of Dr. Schweitzer to Dr. Laws.

"MISSOURI UNIVERSITY, COLUMBIA, Mo.,
February 20, 1880.

"My dear Sir, — You can consider the communication to the governor respecting blood-stains at your disposal. As you think favorably of its insertion in a law journal rather than in a medical journal, let it take that course.

"S. S. LAWS.

"STATE OF MISSOURI, EXECUTIVE DEPARTMENT, City of Jefferson, *July 2, 1879.*

"Sir, — A criminal case is pending in the Circuit Court of Clark County, for murder, against William Young. The authorities have possession of a shirt and pair of pants on which there is blood, and the question is whether that blood came from a human being or from an animal. The defendant says from an animal. If the theory of the State is correct, that blood was shed in July or August, 1877. Can any one of the professors of the State

University analyze this blood, and will he be willing to do so, and then deliver his opinion as a witness in the case? Persons may have a reluctance to testify to the results developed by a chemical analysis where the testimony may tend to the conviction of a person for the crime of murder. Young is charged with the murder of the Spencer family (five persons), and I make these inquiries at the instance of the prosecuting attorney, Ben. E. Turner, of Clark County.

"Yours respectfully,

"JOHN S. PHELPS.

"Dr. S. S. Laws, Pres't State University, Columbia, Mo.

"MISSOURI UNIVERSITY, COLUMBIA,
BOONE Co., Mo., *July 5, 1879.*

"Sir, — Your letter, addressed to me at the instance of the prosecuting attorney of Clark County, Benj. E. Turner, Esq., was received by the evening mail of July 3. You mention a prosecution for murder now pending in the Circuit Court of that county, in which the theory of the State depends on determining whether certain stains on clothing were made by human blood, 'shed in July or August, 1877,' and put the inquiry, 'Can any one of the professors of the State University analyze this blood, and will he be willing to do so, and then deliver his opinion as a witness in the case?'

"I at once placed your letter of inquiry in the hands of Dr. Duncan, the professor of physiology in our medical school, and he returned the same, accompanied with the following answer: —

stains on and near a place where violence has been inflicted is always relevant as cumulative proof. And in this connection the following points must be kept in mind : —

“ COLUMBIA, BOONE Co., Mo.,
July 4, 1879.

“ DR. S. S. LAWS : Sir, — After examining authorities on the microscopical examination of the blood, especially in cases of murder, I am unwilling to undertake the investigation, and from that testify before a court of justice. In the present state of our knowledge, it is easy to distinguish *blood-stains* from all others; but it is almost impossible to decide between the red blood corpuscles of man and those of the lower animals, especially the mammalia; much more difficult is it to differentiate between them after the blood has become dry. Says Dr. Lionel S. Beale in *The Microscope in Medicine*, published in 1878, page 266: ‘ I can hardly think that in any given case the scientific evidence in favor of a particular blood-stain being caused by human blood, will be of a kind that ought to be considered sufficiently conclusive to be adduced, for example, against a prisoner upon his trial.’

“ The same author, on page 267, says, in speaking of human blood and of that of the lower animals: ‘ This is a serious difficulty, and up to this time I fear we must admit that we are unable to decide with sufficient certainty to justify us giving our evidence in a court of law.’ On page 307 of *Taylor’s Medical Jurisprudence*, by Reese, 1873, are these words: ‘ There are *no certain* methods of distinguishing microscopically or chemically, the blood of a human being from that of an animal, *when it has once been dried on an article of clothing.*’ From these facts and others which it is not necessary to relate, I do not undertake the

examination. If the jury are not satisfied as to whether the *stain* is blood or not, that can be easily determined; but the matter is too grave to admit of speculation. If the blood were fresh it would be easy to determine the character of it; also, we can readily distinguish between the blood of mammals and other animals whether the blood is fresh or not, but not between the blood of man and the other mammalia. Hoping this is satisfactory, I remain yours respectfully,

“ JOHN H. DUNCAN.

“ As I regard the position taken by my accomplished young colleague as judicious and valid, it may not be improper for me, with the view of aiding in settling the practice of the courts, to supplement his response with some confirmatory citations and statements of facts showing the present state of our knowledge on the subject, to the extent proper within the limits of a letter of not unreasonable length.

“ 1. The differential element by which the blood of different animals is distinguished is the corpuscle. The white corpuscles or globules cut no figure in this investigation, for the reason that, not only are they greatly inferior in number, being in man about as one to three or four hundred, but they are destitute of coloring matter, and ‘ present nearly the same general features of size, form, and structure throughout the series of vertebrate animals.’ Prof. J. C. Dalton’s *Physiology*, 6th edition, p. 257, published by Henry C. Lea, Philadelphia, 1875.

“ 2. With the exception of some ruminants, viz. the llama, the alpaca,

Heavy blunt instruments may produce death without immediate effusion of blood ;¹ a weapon may be wiped after the fatal blow ; and in all cases, the handle, casement, and joints of the weapon should be scrutinized. Often a weapon, after inflicting

and the camel, the blood corpuscles are in all mammals the same in form and differ only in size. 'The blood corpuscles of mammalia present almost unexceptionally the form of bi-concave disks, and the only slight variations in them are those of size.' H. Frey's *Histology and Histo-Chemistry of Man*, § 68, published by D. Appleton & Co., 1874. Again: 'The non-nucleated blood corpuscles of the mammalia do not differ in form from those of man, except that in the camel and llama they are oval, and all the lower vertebrates have, almost without exception, oval, nucleated blood corpuscles of the shape of melon seed.' Koelliker, by Huxley, p. 712. And again: 'The differences in most of the mammalia are certainly slight. The form remains; only the diameters vary somewhat. A few ruminants, viz. the camel, alpaca, and llama, have oval cells.' Frey's *Histology* by Cutter, published by G. P. Putnam's Sons, 1875.

"3. The physiologies abound in plates and figures exhibiting the differences of form and diameter, but as to the vital question of the measurements of diameters, as a general rule, there is no definite standard, and no adequate indication of the conditions of measurement. 'Hence we must be on our guard respecting the inconsiderate employment of the various tables that have been published on the size of the blood corpuscles of different animals.' Stricker's Manual, pub-

lished by Wood & Co., New York, 1874, p. 267. Wharton & Stillé, 3d edition, published by Kay & Bro., Philadelphia, 1873, in speaking of the comparative value of the microscope in these investigations, say, in § 753: 'The results will be fully as valuable as, and open to fewer objections than, the chemical tests.' And in § 755, they conclude: 'But the globules in all the mammalia (with the exception of the camilidæ) are so nearly alike in size and other characters to those of man, that practically no distinction can be made.' In § 758, Dr. J. G. Richardson, microscopist of the Pennsylvania Hospital, has formulated the opinion as to the detection of the difference between human blood and that of ordinary domestic animals, thus: 'That in such cases a careful observer with our present improved microscopes may give a positive opinion.' And in Gilman's revision of Dr. Beck's *Medical Jurisprudence*, 1863, vol. 2, p. 147, the following remark is made: 'Little difficulty need now be experienced in finding in any large community more than one physician who could with great certainty identify blood corpuscles under the microscope.' Such statements are believed to be misleading; the identification of a corpuscle as a blood corpuscle falls entirely short of the differentiation of the blood corpuscle of one animal from that of another; and, as to any 'positive opinion' touching such differentiation, especially in a

¹ 2 Whart. & St. Med. Jur. § 689. In *O'Mara v. Com.* 75 Penn. St. 424, it was held that the extent of the effu-

sion of blood was admissible to indicate the nature of the wound.

a rapid incised or punctured wound, is wiped by the edges of the wound closing before blood has reached the surface.

case of dry and clotted blood, the testimony of such witnesses as some of those cited above, who are experts with microscopes of the highest powers and all their known accessories, should reduce such a pretence to silence. The progress of our science and the improvement of our instruments have in this matter repressed dogmatism and induced reverent reserve.

"4. Even the spectroscope has not relieved the case. The dilemma remains. Mr. Sorby, in Guy's Hospital Reports, 1869-70, says: 'In conclusion, I must say that, in examining some thousands of spectra, I have been led more and more firmly to believe that with anything like reasonable care there is no difficulty in obtaining satisfactory proof of the presence or absence of blood. I do not at present see any probability of deciding, by the spectra, from what kind of animal it came.'

" 'The age of a stain is no impediment to the spectroscopic test.' . . . Mr. Sorby states that he has 'been able to discover hæmatin — the coloring matter of the blood — with the spectroscope after forty-four years.' Forensic Medicine and Toxicology, by Drs. Woodman & Tidy, 1877, p. 516.

"I will close these citations with another extract from the last-named work, which is a standard authority of recent date, and up to the most recent investigations: 'Lastly, having proved conclusively that the stain is a blood-stain, we venture, at the risk of being accused of needless repetition, to add a word of caution. You will probably be asked these questions in the witness box:—

" '1. Was the blood human?

" '2. From what part of the body was it derived?

" '3. What is the probable age of the stain?

" 'To these questions, as a rule, you had better confess your inability to reply. Never venture rash answers. The replies can, save in a few exceptional cases, be little else than guesses, and it is dangerous in the extreme to guess in the witness box.'

"Let it be borne in mind that neither the reactions of the laboratory nor the lines of the spectroscope are of any avail in distinguishing the red blood corpuscles of one mammal from those of another under any conditions; also that, with the exceptions named, the form in the mammals is always that of a circular bi-concave disk, so that the *only difference* discernible is in the *diameters* of these disks.

"A very brief indication of the state of facts will sufficiently show how entirely at sea we may be in any given case, in the search for precise and reliable results in the microscopic measurement of these diameters. The diameter of the red corpuscles of human blood is usually given as 1-3500 of an inch; but Koelliker gives the average at 1-3600, Robin at 1-3437, Gulliver in his tables at 1-3200 of an inch. In fact, the variations range from below 1-3000 to above 1-4000 of an inch. Within this range of variation fall the measurements of the red blood corpuscles of a multitude of mammals, viz. the dog, the monkey, the whale, the seal, the ass, the bear, the wolf, the raccoon, the rabbit, the beaver, the badger, the otter, the opossum, the porcupine, the mouse, the rat, the squirrel, and others. This meagre sketch is enough to show that the microscopist who would venture

In stabs, the dagger or knife may inflict death without receiving any blood-stains, or at the most a film, which leaves when dried a faint yellow-brown tinge.

to infer, from the measure of the corpuscles under his glass within the limits indicated, a 'positive opinion' as to whether they came from man or from one of the other mammals, is in much the situation of one who would venture to testify, from an inspection of the measure used, the kind of grain his neighbor had sold in market.

"It is probably unnecessary to pursue this matter further at present. Doubtless, appreciable differences exist and are approximately distinguishable in a general way, but they are not so settled and uniform as to be susceptible of precise determination.

"I am aware that there is a popular impression that scientific men are in possession of the means of determining with precision whether such stains as those on the garments in the possession of the State in the pending prosecution were caused by human blood, and I fully appreciate the grave consequences of the negative conclusion submitted above, but the evidence is overwhelming that we have no means of exact determination in even fresh blood; and in cases of clot or dried blood, as the shrivelled corpuscles may not, probably will not, by the imbibition of fluid, resume their exact original physiological dimensions, that circumstance will also aggravate our uncertainties."

Dr. Schweitzer, Professor of Chemistry in the same institution, writes: "I base my opinion not so much on my own personal experience, as on the published results of the labors of experts in the line of physiological and pathological research involved in an answer to the question. It is obvious

that such an answer requires the fulfilment of the following propositions:

"1. That human blood possesses some constituent or characteristic which is absent from the blood of all other animals in health or disease.

"2. That this constituent or characteristic is not influenced by age, sex, or condition.

"3. That removed from the system it preserves its identity through time and the active chemical and physical effects of atmospheric influences.

"No merely chemical test fulfils the foregoing three propositions, and the only one that has ever been attempted to be utilized in a legal way is the microscopical test, based upon the shape and size of the red blood corpuscles; but this test leads to a differentiation merely in degree and not in kind; and since the influence of sex, age, and disease on the physical aspect of blood corpuscles in man and beast has by no means yet been sufficiently investigated, I pronounce the decision of the question, with the knowledge we have at present, impossible. In support of this opinion I cite the following passages from authors of acknowledged reputation:—

"Lehrbuch der physiologischen chemie von E. F. v. Gorup-Besanez, 2d ed. 1867, p. 295 (speaking of the red blood corpuscles of man). . . . The diameter of these disks is usually 1-3822 to 1-4615 of an inch, with extremes in both directions of from 1-3000 to 1-6977 of an inch. From Welcker's measurements the mean diameter of human blood corpuscles is found to be 1-3282 of an inch. Page 346: Regarding the size of blood corpuscles, which becomes occasionally a

The absence of blood-stains on the dress of the accused affords but a slight presumption of innocence, even in cases of violent

matter of great importance in medico-legal inquiries, and must not be passed over here, the following tabulated figures are given:—

“ Page 346. The average size of the blood corpuscles of various animals is as follows: Man, 1-3871 of an inch; ox, same; horse, 1-4800 of an inch; rabbit, 1-4286 of an inch; elephant, 1-2927 of an inch. Page 349. . . . Finally, to distinguish between human and animal blood is in most cases impossible, or if possible at all, possible only when the conditions are extremely favorable. Page 350. . . . To distinguish and measure blood corpuscles presupposes on the one hand that they are still recognizable or can be made so, which in the case of old, slight, and long dried stains is seldom possible; and on the other hand, that their sizes and forms are of sufficiently great divergence. It will, therefore, be indeed possible to distinguish in dried blood-stains, under certain conditions, the blood of man from that of birds or fish, but not the blood of the ox or pig from that of man; for in this case the shape of the blood corpuscles offers no guide to distinction, and the sizes are so little different from one another that they can scarcely be esteemed of value in the determination of blood corpuscles that have once become dry and been soaked again. C. Schmidt found as the mean of forty measurements the diameter of dried human blood corpuscles 1-6350 of an inch, and the deviation from the diameter of undried blood corpuscles sufficiently great to base upon it a diagnosis. We must, however, in spite of it call for caution in all cases in which the guilt or innocence of the accused is at stake. In a sample of earth apparently soaked full of, and

showing the color of coagulated blood, Erdman found on microscopical examination bodies, which at first sight might easily be taken for blood cells, but which were derived from an alga, *Porphyridium cruentum* Naegeli. *Anleitung zur Ausmittelung der gifte*, F. I. Otto, 1870, p. 116. To give a reliable judgment in the case of blood-stains being caused by human or animal blood will be declined by every chemist.

“ *Die Blutproben vor Gericht*, etc. Huenefeld, 1875, p. 5. From glycerin I expected a conserving effect for the blood cells, if not alone, yet mixed with sodium chloride; but I was disappointed; it soon dissolves them. Page 7: If then, as is extravagantly stated sometimes, the microscopical test be decisive, and it is not added that this is meant for the non-dried blood, it may easily mislead the non-expert.

“ *A Treatise on Human Physiology*, by John C. Dalton, 6th ed. 1875, p. 253. But by microscopic examination of the red globules, either when fresh or after having been dried and again moistened, we can often distinguish the blood of an inferior animal from that of the human subject. . . . But if the specimen contain circular globules, without nuclei, it will be impossible to say positively, in any instance, that they belong to human blood, and not to that of some animal, such as the ape or the dog, whose red globules nearly approach the human in size. In most of the domesticated quadrupeds the globules are smaller than in human blood; but in both the sloth and the elephant they are larger. If it were only required to decide whether a given specimen of fresh blood belonged to man or to the musk-

homicide by cutting, since such stains may have been effaced, and since, also, there are many cases of such homicides (*e. g.* cutting a throat from behind), in which the blood would not reach the person of the assailant.¹

The form and direction of blood-spots on walls or furniture may indicate the position of a wounded person in respect to such spots;² and the way in which blood-stains lie on clothes may form a means of determining the place from which the blood spurted.³

On clothing, supposing it to be identified with the deceased, which is a prerequisite,⁴ the direction of the flow of the blood must be examined. If downwards it proves an upward blow, and indicates that the wounded person was more or less erect at the time of the wound.

Splattering may indicate an arterial wound, or a continued struggle.

On shirts, blood-stains may arise from flea or mosquito bites; and the shirt may have been worn on both sides. In Alley's case, tried in Boston in 1873, one hypothesis presented by the defence was that the blood was caused by a menstrual discharge from the defendant's wife. But when the blood is dried, no satisfactory solution of this question can, as has been already seen, be reached.⁵

deer, for example, or even to the goat, no doubt the difference in size of the globules would be sufficient to determine the question. But within nearer limits of resemblance it would be doubtful, because the size of the red globules varies to some extent in each kind of blood; and in order to be certain that a particular specimen were human blood, it would be necessary to show that the smallest of its globules were larger than the largest of those belonging to the animal in question, or *vice versa*. The limits of this variation have been tolerably well defined for human blood, but not sufficiently so for many of the lower animals to make an absolute distinction possible. In the examination of stains or blood-

spots the difficulty is increased by the fact that the drying and subsequent moistening of the globules introduces another element of uncertainty as to the exact original size."

¹ Taylor's Med. Jur. by Reese, 290.

² See *Richardson v. State*, 7 Tex. Ap. 487.

³ *Com. v. Sturtivant*, 117 Mass. 122. *Supra*, § 777.

⁴ Secondary evidence of the condition of the clothing may be given, though the clothing be not produced. *Com. v. Pope*, 103 Mass. 440. *Supra*, § 767.

⁵ See *supra*, §§ 767, 777 *a*; *Com. v. Sturtivant*, Appendix, Whart. on Hom.; *Com. v. Udderzook*, *Ibid*.

Blood-stains, or what appear to be such, may be proved as tending to the identification of specific articles.¹

§ 779. Hair, adhering to a weapon, is evidence connecting the weapon with the homicide, when the hair resembles that of the deceased. But hair should be carefully examined by microscope so as to determine whether or no it is human. Thus, Dr. Lyons details a case where a *prima facie* case of homicide was rebutted by proof that the hair was that of a brute.² So, in a case tried in Massachusetts in 1874, an inference that a stake traced to the defendant had been used in the homicide was drawn from the fact that the stake, besides being bloody, had on it a piece of bone, such as in the blow given might have been taken from the deceased.³

Inference from things adhering to weapon.

The same remarks apply to fibres of clothing. In a case cited by Dr. Taylor,⁴ “a razor was produced in evidence, with which it was alleged the throat of the deceased had been cut. I examined the edge microscopically, and separated some small fibres from a coagulum of blood, which, under a high magnifying power, turned out to be cotton fibres. It was proved that the assassin, in cutting the throat of the deceased while lying asleep, had cut through one of the strings of her cotton night-cap.” Other cases are cited by the same author of woollen fibres thus being mixed with blood.⁵

§ 780. We have already had occasion to advert to cases in which injuries have been inflicted, either casually, or in order to evade a probable though unfounded suspicion of complicity, on a body after death.⁶ Other cases may occur in which wounds are inflicted in order to heap on the dead frame marks of execration; and of these we have illustrations in the cases of dismemberment of corpses after collisions inflamed by intense party or social excitement. It may also appear that a person, on whom certain wounds are visible, died really from poison administered by himself. In all cases a

Indications as to whether marks on body were after death.

¹ Com. v. Tolliver, 119 Mass. 312. ⁴ R. v. Harrington, Taylor's Med. Jur. by Reese, 386.
² Apology for the Microscope, p. 24. ⁵ See Kennedy v. People, 39 N. Y.
³ Com. v. Sturtivant, Appendix 245. ⁶ Supra, § 743.
Whart. on Hom.

causal relation between the wound and the death must be established.¹

¹ Whart. Crim. Law, 8th ed. §§ 152 *et seq.*

"At an inn in France, a quarrel arose among some drovers, during which one of them was wounded with a knife on the face, hand, and upper part of the thorax, near the right clavicle. The injuries were examined and found to be superficial and slight. They were washed, and an hour afterwards he departed for his home, but the next morning was found dead, bathed in blood. Dissection was made, and the left lung and pulmonary artery were found cut. The surgeons deposed that this injury was the cause of death, and that it must have been inflicted after the superficial wound on the thorax, which was not bloody, but surrounded by ecchymosis. Such proved to be the fact, — on his way home he had been robbed and murdered. Beck's Med. Jurisp. 588, 7th ed. In another case, a girl expired in convulsions while her father was in the act of chastising her for a theft; and she was believed, both by himself and the by-standers, to have died of the beating. But, although there were marks of a large number of pretty severe stripes on the body, they did not appear to the medical man who saw it to be quite sufficient to cause death; and he therefore made a *post-mortem* examination, from which and other circumstances it was discovered that the girl on finding her crime detected had taken poison through fear of her father's anger." Beck's Med. Jurisp. 766, 7th ed. As an illustration to the same effect see Barron's case, *supra*, § 726; Best's Ev. 8th ed. 563; Norkot's case, 14 How. St. Tr. 1324.

Dr. Casper (Gericht. Med. 307) enumerates the following conditions

as throwing light upon this question: —

1. The condition in life and personal surroundings of the deceased, so far as they may be likely to impel to suicide.

2. Threats or intimations on the part of the deceased that he harbored such a purpose; he being found in a room made fast from within, &c.

3. Of far more importance, however, is an examination of the body, its position, the clothing, &c.

Where death has been produced by shooting, the following circumstances require attention: —

1. The position of the body. Many authors have advanced the opinion that when the body of a person who has been killed by shooting is found resting on the back, this fact is a sure indication of suicide, while other positions of the body indicate some previous struggle. From this Dr. Casper dissents.

2. Whether the weapon used be found near the dead or not is a circumstance which, according to Dr. Casper, proves nothing, since in the case of suicide the weapon may be stolen away, and in case of murder be left lying near the body in order to mislead. When the weapon is found, however, it often adds something to the probabilities of the case. As, for instance, if the weapon be old and rusty, or in very bad repair, it is not probable that such a one would be selected by a murderer for the execution of his purposes. So, too, if the weapon has exploded from being too heavily loaded, the fact would rather point to suicide, as the overcharge was probably inserted through ignorance, or else from a desire to make sure work. The ball should of

§ 781. We have already incidentally observed that the character of the wound, together with the position of the deceased, and the condition of his clothing, are to be considered for the purpose of determining whether the death was self-inflicted, or the work of another person.

Indications
whether
wounds
were homi-
cidal or
suicidal.

course be compared with the barrel of the weapon. This is often impossible, as the ball frequently passes through the body; is sometimes mutilated, and slugs and buckshot are frequently used, which are adapted, of course, to barrels of all sizes. The matter, however, is not one of much importance, as the murderer who leaves a weapon lying by the body would be most apt to leave the identical one used.

3. The hands of the dead body, in some cases, help to solve the doubt. Where the pistol is found so firmly clinched in the hand that the fingers must be sawed off in order to get it loose, this is an infallible mark of suicide. In cases also where the fingers are thus broken, or where the skin of the hand is thus injured, these are, generally, indications of suicide, although sometimes they may point to a previous struggle with the murderer. Where the hands are blackened by powder being burnt into them, this affords a strong probability of suicide, unless there is reason to believe that the discoloration was produced at some other time, and not by the shot which caused death. This case, however, is not to be confounded with that grayish-black color sometimes given to the hands by working in metal, which latter may be washed off, while the former remains fast. It is no negative evidence against the fact of suicide that the hands should be entirely free from this discoloration. Gloves may have been worn which have afterwards been stolen from the body; or the hands may not

have been directly employed in firing the weapon; and, in fact, with percussioned fire-arms, no such discoloration is apt to be received except where the instrument is awkwardly used. So, also, injuries to the hand are not apt to occur except through unskilful management, and hence, in the majority of cases of suicide, no such marks are found.

4. The direction followed by the ball, as we have seen, sometimes furnishes important evidence in the question of suicide. In cases, for instance, where the ball is found to penetrate from behind, or to run downwards, it may often be seen that suicide cannot have been possible. If the barrel of the pistol has been placed in the mouth and then fired, the probability is strongly in favor of suicide. In the great majority of cases, however, the question must be left doubtful so far as its answer depends upon an examination of the body. See *supra*, § 771. The most that the physician can say, usually, is, that the probabilities are greater or less, as the case may be, in favor of suicide, or that there is nothing inconsistent with the fact of suicide.

5. Where the throat is cut in suicide, the wound runs commonly from left to right, although the opposite may sometimes occur. In many cases, it is impossible to trace the course of the wound, and, sometimes, to determine which, among many wounds, proved the mortal one. When none of the above-mentioned circumstances render the case in hand a plain one, the physician can only give an opin-

In addition to the points already noticed,¹ the question of motive is to be considered. Was the party on whom the injuries were inflicted likely to have caused them by his own hand? (1.) Would it have sheltered him from impending prosecution could he make it appear that he was robbed after a stout resistance? A bank officer, for instance, who believes himself to be a defaulter, may, to avoid discovery, concoct a plan by which all the appearances of a violent attack on his office may be exhibited, and may even inflict on himself mortal wounds.² (2.) A family may be rescued from ruin by the falling in of a life insurance, and the party insured may for this purpose put an end to himself. (3.) Wounds may be self-inflicted in order to make out a case against an alleged enemy, to whom the injury is to be imputed. (4.) To avoid military or other duty similar devices may be resorted to. (5.) A person morbidly craving sympathy or desiring to produce a sensation may subject himself, in order to gratify this yearning, to great physical discomfort, to wounds, to dismemberment, and to fastings or even poisonings likely to produce death.

§ 782. Hanging, as is noticed by Dr. Casper,³ is most frequently resorted to by suicides, suffocation rarely, and throttling, perhaps, never. It would be very difficult to hang a person in full life and strength against his will, and in such cases the body would almost certainly show the traces of a previous struggle, while murder may easily be effected by throttling or suffocation. It must be observed in this connection, however, that certain red, or reddish-yellow and brown spots upon the face, neck, breast, &c., may be nothing more than the results of a rough handling of the body subsequent to death, and are not to be mistaken for marks of a struggle during life. As regards the position in which the body is found, there is no position, whether it be that of a person suspended in the air, or with the feet touching the ground, or in a sitting or kneeling posture, or lying obliquely on the floor, &c., which precludes the supposition of suicide, since cases of undoubted suicide are quoted in which each of these positions has been observed. On the other hand, ion as to the greater or less probability of suicide; and, in many cases, he cannot safely go farther than to say that he finds nothing inconsistent with

the supposition that the death is that of a suicide.

¹ Supra, § 776.

² See Barron's case, cited supra, § 726.

³ Gericht. Med. ed. 1867, p. 518.

the situation of the body may sometimes clearly indicate suicide, as where it is found hanging high up in a tree.

Post-mortem examinations, according to the same high authority, can never decide the question whether strangulation was the actual cause of death, except where appearances are found which belong exclusively to such cases; as erection or swelling of the *penis*, emission of semen, suggillations on the neck, and tearing of the muscles of the neck.

§ 783. Dr. Casper states the points in reference to drowning as follows:¹ The question which arises first is whether death was actually produced by drowning, or whether the body was thrown into water subsequently to death.

Inferences
in drown-
ing.

This latter often happens in the case of young infants. It may also be possible that suicide has been committed by some other means even when the body is found in water; as the party may have inflicted some mortal wound upon himself at the water's edge, or while standing in the water. In these cases an examination of the body will show that death was produced by some other means.

Injuries found upon the dead body can seldom be relied on as showing violent treatment by another person. These injuries may have been produced by the party himself in an attempt at suicide, and drowning have been afterwards resorted to. Or they may have been produced by striking against some object in the act of drowning. Or they may have been caused by the body, after death, coming in contact with floating ice, stays of a bridge, a ship's rudder, or other colliding objects. Where the process of decomposition is considerably advanced, it will be very difficult to distinguish between the appearances which result from decomposition, and suggillations produced by violence done to the living body, and here even experienced physicians may be deceived. In this, as in all other cases, some light may be thrown upon the question by the circumstances attending the particular case. As, for instance, where the body is naked and the season a proper one for bathing, the probability will be accidental drowning, and so when the deceased was a person whose business was on the water. On the other hand, traces of blood

¹ Gericht. Med. p. 580. See 2 Wh. & St. Med. Jur. § 938.

upon the shore, torn clothing, articles of clothing belonging to another person, may indicate probable murder.

Whether the water in which the body is found is deep or shallow, a dirty pond or fresh pool, may serve to throw light upon the question; although it may sometimes happen that a drunken, feeble, or epileptic person may be drowned in shallow water, or in a ditch or fetid pond.¹

¹ Where there is no doubt that death was produced by drowning it is often important to discover how long the body has probably lain in water, as when it is desired to compare the time of death with the time of some supposed murder. The stages of decomposition in the case of a body lying in water are elsewhere described. The difference produced by different temperatures of the water, and between running water and a stagnant pool, must, of course, be borne in mind. The fact, also, that decomposition takes place with unusual rapidity when the body is exposed for any length of time after being taken from the water, must not be overlooked. One marked peculiarity, connected with bodies which remain lying in water, is the fact that decomposition begins at the head, while with bodies kept in other mediums it begins at the surface of the belly.

A body which in summer has lain in water about eighteen hours, or, in winter, from twenty-four to forty-eight hours, and has then been exposed to the air for the same length of time, shows — while the rest of the body has still the usual color of a corpse, and while no trace of greenish discoloration is seen on the surface of the belly — first upon the face and head, as far as to the ears and nape of the neck, a light livid bluish color, which soon changes to a brick-red. These places show no suggillation when cut into. If death has been actually produced

by drowning, white foam and bubbles will issue from the mouth and nose. Bluish-green spots will soon appear on the ears, the temples, and nape of the neck, which gradually extend to the neck and breast. These spots continue to spread while the body remains in water; so that where the entire neck and head have a dirty-green color intermingled with dark-red, it may be concluded that the body has lain in the water from three to five weeks in summer, or from two to three months in winter. This discoloration of the head, neck, and breast is often seen in cases where the rest of the body is, as yet, very little discolored. The appearances which follow have been already described.

Where the entire body is greatly swollen and of a grayish or blackish-green color, with thick dirty-red surface veins; where the *epidermis* is all loosened, the features no longer recognizable, the ears, eyelids, and lips also swollen, the color of the eyes undiscoverable, the nails loosened and hanging to the skin on the fingers, and the *scrotum* and *penis* enormously swollen, it may be concluded that the body has lain in water five or six weeks, if it be summer, or twelve weeks and longer, if fall or winter. If the body has continued in water seven, eight, or ten weeks during summer, or from four to six months during winter, the stage of decomposition will be still further advanced; but at this period there is much greater uncertainty con-

IV. INFERENCES FROM LIABILITY TO ATTACK.

§ 784. Liability to attack may be assigned ordinarily to one or more of the following causes: (1.) Rapacity, excited by the possession of money or valuable articles; (2.) Special obnoxiousness to certain desperate parties; (3.) An old grudge, or similar cause, such as a previous quarrel; (4.) Jealousy. In the first of these cases the questions arise whether the fact that the deceased was in the possession of money, particularly if the amount be considerable, was known to any one; and if so, to whom; whether money was found on the corpse or was missing; whether there is evidence that any suspected party, suddenly and from an unexplained cause, became possessed of a large sum,¹ paid long standing and pressing debts of considerable amounts, or largely increased his expenditures. Pedlers, especially itinerant vendors of jewelry and other valuable articles, are from this cause rendered peculiarly liable to attack, and it is of importance to inquire, in cases of this description, who was last seen in company with the deceased, or having any of the articles known to have been in his possession.²

To show that the motive was to get rid of an importunate creditor, it is admissible to introduce evidence showing that the deceased had a pecuniary claim on the defendant.³

nected with the question of time, since changes now take place very slowly. The appearances of this stage are: the skin loosened from the skull and hanging in shreds, to which hair is loosely attached; the eyes have disappeared; parts of the body will commonly be found mutilated by water-rats, &c.; the face and other parts will be infested with maggots; certain joints will be loosened; the whole body will be swollen to colossal proportions, be of a black or blackish-green color, and exceedingly offensive; the nails will have generally disappeared; saponification of portions of some muscles will have taken place. At this stage it will be impossible to recognize the body. Casper, *ut supra*; 2 Whart. & St. Med. Jur. §§ 938 *et seq.*

¹ See *supra*, §§ 23, 24, 758 *et seq.*

Where the prosecution, in a homicide case, contends that the murdered man had a certain sum of money in his possession, and that the taking of this was the motive of the murder, the defendant may show that no money was missing; but information obtained by the administrator of the deceased, upon inquiry by him, as to what moneys the deceased had received, and what he had paid out prior to his death, is hearsay evidence and inadmissible. *Com. v. Sturtivant*, 117 Mass. 122. See *supra*, § 762.

² Wills on Circum. Ev. 237-243. See *Lindsay v. People*, 63 N. Y. 143.

³ *Hamby v. State*, 36 Tex. 523.

"On a late trial for murder, Lord Chief Justice Campbell thus summed

It is also relevant to inquire whether the party charged was on bad terms with the party injured, or was inflamed by any

up the doctrine under discussion: 'With respect to the alleged motive it was of great importance to see whether there was a motive for committing such a crime, or whether there was not; or whether there was an improbability of its having been committed so strong as not to be overpowered by positive evidence. But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know from the experience of criminal courts, that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off, for a time, pressing difficulties.' " Wills Circum. Ev. 5th Am. ed. pp. 43, 44. As to inadequacy of motive see Whart. Crim. Law, 8th ed. § 121.

See also remarks of Judge Wells, in *Com. v. Sturtivant*, Appendix to Whart. on Hom.

"Another form in which murder is committed for the sake of immediate gain is when the property of a person has been, by the force of circumstances, brought under the control or within the reach of another; and nothing but the life of such person prevents its passing entirely into the other's hands. If, by the force of the same circumstances, or by actual contrivance or artifice, the person also is brought within reach, a motive of great force is presented, to attempt the removal of the obstacle by criminal means. In the case of *R. v. Burdock* (see Best on Pres. § 196), an elderly lady, possessed of some property, had gone to live with the prisoner, who kept a lodging-house. Being taken unwell, and attended by the prisoner, the cupidity

of the latter was excited so strongly as to induce her to administer poison in some gruel which she prevailed on her lodger to take, and which resulted in death. The change which was observed soon after in the prisoner's life and habits showed that the death had been to her a lucrative event; and, on the evidence of this, and other cogent circumstances, she was convicted and executed. In the case of *R. v. Patch* (see Wills Circum. Ev. § 230), the prisoner, who boarded with his employer, had been enabled, from his relations to the latter, to obtain, to a considerable extent, the control of his business, and was endeavoring to secure it permanently by a course of fraud. His plans being in danger of frustration by the vigilance of his employer, he was tempted to put the latter out of the way, which he did by shooting him one evening, as he sat in his parlor. The crime, in this case, seems to have been induced by the double motive of the desire of gain and the fear of detection." Burrill Cir. Evidence, pp. 287, 288.

In the trial of the Knapps for the murder of Joseph White, it appeared that Mr. White was childless, and left as his legal representatives Mrs. Beckford, his housekeeper, the only child of a deceased sister, and four nephews and nieces, the children of a deceased brother. He had executed, as was known in the family, a will by which he left by far the larger portion of his estate to Stephen White, one of the children of the testator's brother, reserving a smaller interest to Mrs. Beckford. A daughter of Mrs. Beckford married Joseph J. Knapp, Jr., who, with his brother, John Francis Knapp, were young shipmasters of Salem, of respectable family, the

special animosity to a cause with which the latter was identified.¹ In connection with this, evidence is admissible of threats and

sons of Joseph J. Knapp, also a shipmaster. Shortly after the murder, the father received a letter obscurely intimating that the party writing the letter was possessed of a secret connected with the murder, for the preservation of which he demanded a "loan" of three hundred and fifty dollars. This letter Mr. Knapp was unable to comprehend, and handed it to his son, Joseph J. Knapp, who returned it to him, saying he might hand it to a vigilance committee which had been appointed by the citizens on the subject. This the father did, and it led to the arrest of Charles Grant, the person writing the letter, who, after some delay, disclosed the following facts: He (Grant) had been an associate of R. Crowninshield, Jr., and George Crowninshield; he had spent part of the winter at Danvers and Salem, under the name of Carr, part of which time he had been their guest, concealed in their father's house in Danvers; on the 2d of April he saw from the windows of the house Frank Knapp and a young man named Allen ride up to the house; George walked away with Frank, and Richard with Allen, and on their return, George told Richard that Frank wished them to undertake to kill Mr. White, and that J. J. Knapp, Jr., would pay one thousand dollars for the job. They proposed various modes of doing it, and asked Grant to be concerned, which he declined. George said the housekeeper would be away all the time; that the object of Joseph J. Knapp, Jr., was first to destroy the will, and that he could get from the housekeeper the keys of the iron chest in which it was kept. Frank called

again on the same day in a chaise, and rode away with Richard, and on the night of the murder, Grant stayed at the Half-way House, in Lynn. In the mean time suspicion was greatly strengthened by Joseph J. Knapp, Jr., writing a pseudonymous letter to the vigilance committee, trying to throw the suspicion on Stephen White. Richard Crowninshield, Geo. Crowninshield, Joseph J. Knapp, Jr., and John F. Knapp, were arrested and committed for murder. Richard Crowninshield made an ineffectual attempt, when in prison, to influence Grant, who was in the cell below, not to testify, and when this failed, committed suicide. John F. Knapp was then convicted as principal, and Joseph J. Knapp, Jr., as accessory before the fact. George Crowninshield proved an *alibi*, and was discharged.

The motive was the inheritance to White's estate; and yet the murderers acted on a mistake of law, they supposing that Mr. White's representatives, in case of his death intestate, would take *per stirpes*, whereas in fact they would take *per capita*; so that actually Mrs. Beckford, to increase whose estate the murder was committed, received no more by an intestacy than she would have by the will. ✓

The Webster trial itself furnishes many suggestions which, in this class of cases, should be pursued. Was the defendant at the time desperately insolvent? Was his social position such as to make *appearances* of great moment; and had he been in the habit of playing at heavy odds to keep them up? In *Com. v. Twitchell*, 1 Brewst. 560, it was held competent for prosecution to prove that defend-

¹ *Murphy v. People*, 68 N. Y. 590; *Hinds v. State*, 55 Ala. 145.

declarations of hostile purpose, as well as of quarrels and alienations.¹ But it should always be remembered that there are few persons whose lives have not been at some time threatened; and that the cases where threats have been the mere expressions of transient anger are innumerable. Nor is it likely that a deliberate assassin would embarrass himself by uttering threats in advance.²

Jealousy, and the facts on which it rests, may always be put in evidence as throwing light on motive.³

ant was pressed for money, but not that he lived expensively and had no occupation or means. Were the evidences of debt of such a character as if, carried on the person, could have been easily destroyed; and was there any attempt to induce the deceased to bring them with him to the spot appointed for the interview? What, in other words, were the probabilities of the debt being cancelled by the death; for upon this the question of *intention* would depend? Should it be shown that the debt was one of record, the presumption would be much more in favor of manslaughter, arising from sudden irritability on being pressed with the debt, than it would be should it appear that the deceased had the sole evidences of debt on his person; that he had been invited to bring them, and that they were afterwards destroyed. All this is evidence, and so are those circumstances from which countervailing inferences could be drawn, such as the fact that the deceased had independent securities for the debt, on which the defendant was not liable, or that the defendant's circumstances were not such as to render the discharge of the debt of paramount importance.

In the remarkable trial of Udderzook for the murder of Goss, the evidence was that the deceased's life was largely insured, no doubt in pursuance of a fraudulent conspiracy that after

the insurance he should disappear, and the sum be collected from the company. This was attempted; but as his continued existence, after the payment, was inconvenient to his co-conspirator, he was killed by the latter. On the trial, the whole history of the insurance was held legitimate testimony, as showing the motive. *Com. v. Udderzook*, reported Appendix to Whart. on Hom.

¹ See *supra*, § 756; *People v. Hendrickson*, 1 Parker C. R. 406.

² *Supra*, § 756. An illustration of this is to be found in the Wellington Dispatches published in 1880. Scarcely a day passed, during the Reform agitation, in which the duke did not receive letters threatening assassination.

³ *Infra*, § 785. See *Com. v. Madan*, 102 Mass. 1; *McCue v. Com.* 78 Penn. St. 155; *Nesbit v. State*, 43 Ga. 238; *Templeton v. People*, 27 Mich. 501.

"It was certainly competent to show that the prisoner and the deceased had visited the same woman, and to follow this by evidence that, immediately after the homicide, the prisoner referred to the fact that he warned the deceased to let her alone, that she would be a curse to any one, and now his words had come to pass. Jealousy is among the strongest of the human passions, and it certainly was for the jury to determine, in the absence of

V. DISTINCTIVE INFERENCES IN MARITAL HOMICIDES.

§ 785. Among the circumstances from which malice, in a killing by a husband of his wife, may be inferred, are adultery by either husband or wife, illustrating a desire to get rid of the marital relation;¹ and bigamy by either party.² Thus where A., a husband, after an absence, during which he was believed to be dead, returned and found his wife married to B., and B., after an altercation and partial reconciliation, shot A.; the marriage, absence, and second marriage, were held admissible as facts from which to infer malice.³

§ 786. Long ill-treatment by husband of wife;⁴ misconduct, leading to a suit against him by his wife to compel good behavior;⁵ and continual quarrels between husband and wife, are relevant to prove motive in cases of marital homicide; though as instances of such quarrels are very numerous, generally expending their force in words, such proof is entitled to little weight unless connected in some way with the fatal wound.⁶

any other assignable motive, whether it was the cause of the prisoner's act." Agnew, J., *McCue v. Com.* 78 Penn. St. 185.

¹ *Supra*, § 51; *Com. v. Costley*, 118 Mass. 2; *Turner v. Com.* 86 Penn. St. 54; *Binns v. State*, 57 Ind. 46; *Weyrich v. People*, 89 Ill. 90; *Templeton v. State*, 27 Mich. 501; *State v. Rash*, 12 Ired. 382.

² *State v. Green*, 35 Conn. 205. *Supra*, § 51.

³ *Com. v. Smith*, 7 Smith's Laws, Ap.; 2 Wheel. C. C. 80. See *Binns v. State*, 66 Ind. 428. *Supra*, § 51.

⁴ *State v. Watkins*, 9 Conn. 49; *State v. Green*, 35 Conn. 203; *McCann v. People*, 3 Park. C. R. 272; *Costley v. State*, 48 Md. 175; *Stone v. State*, 4 Humph. 27; *State v. Langford*, Busbee, 436. See *Binns v. State*, 57 Ind. 46.

⁵ *People v. Williams*, 3 Park. C. R. 84.

⁶ See *State v. Watkins*, 9 Conn. 49;

State v. Green, 35 Conn. 203. *Supra*, § 51. In a New York case (*McCann v. People*, 3 Parker C. R. 272), a witness was offered to prove that during his acquaintance with the defendant who was charged with murdering his wife, which acquaintance ended a few months before the death, the husband and wife had frequent difficulties and altercations. It was held that the evidence was admissible as tending to show want of affection, and as justifying the jury in inferring that the same state of mind continued after the witness moved away. It was also ruled that evidence was admissible on the question of motive, to show that about six months before the homicide the wife made a complaint against her husband for an assault, on which he was held to bail. In a similar case, it was held that it was competent for the government to show, that some time before the alleged killing the wife had complained of her hus-

VI. DISTINCTIVE INFERENCES IN POISONING.

§ 787. In the examination of alleged cases of poisoning, it is peculiarly important to keep in mind the rule, that to sustain a criminal conviction guilt should be made out beyond reasonable doubt.¹ (1.) The supposed poison may have been an innocuous drug; (2.) The giving of the poison may have been accidental, or it may have been an imprudent overdose of an opiate or other powerful remedy, self-administered; (3.) The disease of which the deceased died may not have been induced by poison, since there are few symptoms attendant on poisoning which are not also attendant on certain types of natural disease;² (4.) As to *post-mortem* observations, it is to be observed that substances supposed to be poison may have been the accumulation of over-dosing by the deceased himself, or have been surreptitiously introduced into the body, or may be after all innocuous matter; or, if deleterious, may not have been the real cause of death. As to each of these points, however, there must necessarily be more or less doubt; as it can never, in other words, be demonstrated that a substance administered to the deceased, or found in his body, actually caused his death, or that this substance was administered to him with the intention of killing him. On the other hand, we must recollect that there are countervailing considerations which enable us to determine the guilty intent with greater certainty in poi-

band as a disorderly person, and that he was adjudged to pay two dollars weekly for her support. *People v. Williams*, 3 Parker C. R. (N. Y.) 84.

In *Sayres v. Com.* 88 Penn. St. 29, it was held that where it had been shown that the prisoner had domestic troubles, extending over years, it was not error to admit evidence of a quarrel that occurred about two years before the murder, for the purpose of showing hatred and malice on the part of the prisoner. It appeared that the deceased refused to live with the prisoner, and he made repeated efforts to induce her to permit him to

do so, one of which immediately preceded his shooting her. The bank deposit books of the deceased and the prisoner were admitted in evidence, for the purpose of showing that the prisoner had exhausted his funds and was in destitute circumstances, and that he had, therefore, a motive in desiring to return to live with his wife. It was held that this evidence was properly admitted.

¹ See *R. v. Sawwell*, Wills on Cir. Ev. 180.

² 2 Whart. & St. Med. J. § 332. Compare article by Dr. Doremus, in 1 Crim. Law Mag. 293 (1880).

sonings than in most other cases of violent homicide.¹ Certain kinds of poison are rarely purchased except for the object of destroying life. Most poisons leave behind them traces which indicate their action. If such poisons, not in ordinary family use, and not likely to have been mistaken for other innocent drugs, have been administered, it is difficult to avoid the inference of intent. And as poisonings are rarely single, there is usually a group of cases from which, should ignorance or mistake be set up, guilty knowledge and intent can be inferred.²

§ 788. It must be remembered that the mere presence of poison in a dead body does not prove the *corpus delicti*, unless it be shown (1.) That the remains were those Proof of
poison in
remains

¹ Mr. Best cites on this point the following:—

“Venenum arguis: ubi emi? à quò? quanti? per quem dedi? quo conscio?” Quintilian, Inst. Orat. lib. 5, c. 7, vers. fin.

In Scotland a conviction is recorded in a case where a servant girl had mixed some poisonous matter with gravy, and Dr. Christison was led to suppose that poison had been swallowed, merely from the circumstance of two persons being taken ill nearly at the same time, after partaking of the same food, and with symptoms which various kinds of poison would produce; though he said that this probability was strengthened by the fact that the violence of the symptoms was in proportion to the quantities of the suspected food taken. More recently Taylor lays down the principle, that while the chemical investigation should never be omitted, yet the detection of poison in the body by means of the chemical analysis is not essential, but the offence will be sufficiently proved if established by the concurrent evidence of the symptoms of the disease, the marks upon the body after death, and other inferential testimony. Taylor, 159. See 2 Wh. & St. Med. Jur. 3d ed. §§ 321 *et seq.* Guy lays peculiar stress

upon chemical investigations, and discovery of poison, if corroborated by other proofs. Guy's For. Med. iii. 404–407. Puccinotti places no reliance on the pathological observations, and on the chemical ones only when all the conditions above cited are fulfilled. Puccinotti, 222, 253. And there are cases in which poison (*e. g.* antimony) may be utterly eliminated from the body before death. See Lancet, Aug. 4, 1860, p. 119; *R. v. Palmer*, cited in Taylor's Med. Jur. by Reese, 101.

As to arsenic see pamphlet by Dr. E. S. Dana, published by Linn & Co., Jersey City. 1880.

² See 2 Whart. & St. Med. Jur. 3d ed. § 323; *State v. Wharton*, cited Taylor's Med. Jur. by Reese, 25; *Com. v. Schoeppe*, cited Taylor's Med. Jur. by Reese, 25; *Pitts v. State*, 43 Miss. 472; *Wills on Cir. Ev.* 180; 33 Am. Jur. 1. As to inference from several poisonings see *supra*, § 52. Compare the observations of Buller, J., in Donnellan's case; of Abbott, J., of Rolf, B., and of Parke, B., cited in *Wills on Cir. Ev.* 187–191. See also *R. v. Geering*, 18 Law Jour. 215. In *Blackburn v. State*, 23 Oh. St. 146, “administering” poison was held to include, “persuading to take.” Causation in poisoning is discussed in Whart. Crim. Law, 8th ed. §§ 133, 161–6, 340.

should not
be received
without
proof of
identity of
remains.

of the deceased ; and (2.) That these remains had not been tampered with by strangers, and that the examination had been conducted in such a way as to exclude the hypothesis of the poison being introduced after exhumation.¹ Hence in a Virginia trial for homicide by poisoning, the omission to prove directly that the body analyzed was that exhumed was properly held fatal to the prosecution.²

§ 789. Poison may be possessed by the defendant either in its manufactured state, or it may be prepared by him. In the latter case we may expect to find materials from which the poison could be concocted, drugs peculiarly or exclusively suited for the purpose of adulterating food, or receptacles fitted for the preserving of such articles. It may be also relevant to show that the accused was in the habit of making materials of this class, and that he was familiar or acquainted with the criminal purposes to which they might be made subservient. Such evidence may be admissible both for the prosecution and for the defence. For the prosecution it may be admissible for the purpose of showing that the defendant had in his hands the drugs by which the crime could be effected. For the defence it may be offered for the purpose of showing that the drugs were in his hands for innocent objects ; or in the ordinary course of his business ; or for domestic purposes. Of the last line of cases a common illustration is the claim that the poison was bought in order to kill rats. This, however, is a defence which is open to rebuttal, by showing that the poison was not so used, or if so used, was used only as a pretext.³

§ 790. In cases of poisons which act instantaneously, some light may be thrown on the question by the position of the body. Thus Mr. Amos⁴ tells us of a trial in which the hypothesis of suicide was defeated by the fact, that while the united result of medical experience is that prussic acid produces *instantaneous* death, the deceased was found with a *corked* bottle in her hand, from which five drachms had been

¹ See *supra*, § 422.

² *Com. v. Lloyd*, reported Whart. on Hom. § 732. See 1 *Crim. Law Mag.* 293.

³ *R. v. Higgins*, 14 *Lond. Med. Gaz.* 896, and cases in Whart. *Crim. Law*, 8th ed. § 345.

⁴ *Great Oyer*, 347.

taken, and with the bed-clothes composed about her person with elaborate precision.¹

§ 791. As cumulative proof in such cases, it is admissible to prove that the defendant unnecessarily forced himself into contact with the deceased, or out of the sphere of his usual duties or habits tried to administer meat or drink to the deceased. It may, under such circumstances, be important to go far back for the purpose of discovering who prepared the meats or had access to the dishes, and such evidence is clearly admissible. There are many cases where it may not be out of place to inquire whether any members of the deceased's family were observed unaccountably to abstain from the dish previously poisoned, particularly if it belonged to the usual meal of the family, or was a favorite of the deceased; whether there was any attempt to prevent others from partaking of it or to dissuade the deceased from abstaining from such food; and particularly, whether there was any effort to prevent a *post-mortem* examination, or to hide or destroy any remaining portions of the food or drink of which the deceased partook, or any of the vessels containing them; or whether there was an effort to throw unreasonable obstacles in the way of the employment of a competent physician during the illness of the deceased.²

Inferences
from con-
duct.

¹ See 2 Wh. & St. Med. Jur. § 321.

² Supra, § 748. See 2 Mitter. Deut. St. § 124.

"Of all the great poisoners, the most stealthy and feline, we have been told, was the widow Zwanziger, known in history by the name of her last husband, the Privy Councillor Ursinus, of Berlin. Madame de Brinvilliers was an enthusiast, who poisoned with a spread and dignity of circumstances which necessarily invited detection. The widow Zwanziger, on the other hand, slid softly about from house to house, poisoning unobtrusively. So quiet and home-like were her attentions to the deceased — so deep and yet so well controlled her grief — so completely her whole deportment that of a tender, sober, and yet undemonstrative friend, that when

her lover, who began to be tired of her, — her husband, of whom she began to be tired, — her aunt, whose heir she was, — successively sickened and died, she was the last who would have been suspected of having dispatched them. Yet this most experienced, self-disciplined, and wary of poisoners, — this actress so consummate, that to the end she played the parts of the lady of fashion, and the sentimental and pietistic poetess with a perfection that showed no flaw, — was careless enough, when engaged in such common game as the poisoning, as if merely to keep her hand in, of an ordinary man-servant, to leave the arsenic open in a room where her intended victim, made curious by one or two abortive operations she had attempted on him, scented it out, car-

§ 792. It used to be held that there were certain poisons which would not operate fatally for months, or even for years after their administration. Under such circumstances, prosecutions were maintained on the Continent of Europe for poisonings in which the death did not occur till years after the alleged guilty act.¹ Under our own law it is necessary, in order to sustain a prosecution for homicide, that the death should have occurred within a year and a day from the injury inflicted.²

§ 793. It has been laid down by medical writers that certain poisons have a stated time to run, and that unless the deceased's illness corresponded with such period, the inference of poisoning is negatived. But the conflict of expert testimony on this point is too great to sustain any definite conclusion; and if it should appear that the defendant was poisoned and died of poison, the length of his illness within the limitation above given is immaterial.³

§ 794. Malice in poisoning cases depends upon two conditions: First, the design must be wickedly to take life or inflict bodily hurt. A physician may administer a dangerous medicine either discreetly or negligently. In the first case, where the drug is administered in order to save life, and the patient, notwithstanding that the physician exercises the diligence usual to good physicians in his circumstances, dies from the medicine, there is no criminal liability. In the second case, where the drug is administered negligently, and the patient dies of the drug, the person administering the drug is guilty of manslaughter.⁴ To constitute malice, therefore, in order to convict of murder, there must be an evil intent to take life, or inflict some grievous bodily harm. But this is not all. There must be a knowledge of the dangerous character of the poison, and it must be actually dangerous. A. may administer

ried it to a chemist, and established the fact that it was of the same character with the poison by which she had seasoned some prunes she had been giving him for dessert." 1 Wh. & St. Med. Jur. § 783.

¹ See on this subject Amos's Great Oyer, 347; and see also discussion

in 2 Wh. & St. Med. Jur. §§ 328 *et seq.*

² Whart. Crim. Law, 8th ed. § 312.

³ R. v. Russell, cited in Taylor's Med. Jur. by Reese, 99. See 2 Wh. & St. Med. Jur. §§ 321 *et seq.*

⁴ Whart. Crim. Law, 8th ed. §§ 362-368.

a supposed enchanted but innocent potion to B., with intent to kill B.; but this will not be administering poison. On the other hand, when the poison is known by the defendant to be deadly, his administering it without proper medical advice is strong proof of malice. If the poison be administered negligently, the case is manslaughter.¹

Whether other poisonings are admissible to rebut defence of accident has been already discussed.² In any view, after due ground laid, it is admissible to prove motive such as would prompt the guilty act.³

VII. INFERENCES FROM EXTRINSIC INDICATORY PROOF.

§ 795. In another work, inferences of this character, so far as concerns questions of identity, are examined at length.⁴

It should be observed that indications such as these, if relevant, go to the jury for what they are worth.⁵ Thus it has been held admissible to put in evidence a memorandum made in pencil in the pocket-book of the accused, and this without proof of handwriting.⁶

¹ Whart. Crim. Law, 8th ed. § 345.

² Supra, § 50.

³ Templeton v. People, 27 Mich. 501.

⁴ 2 Wh. & St. Med. Jur. (1873) §§ 287, 1218.

⁵ Supra, § 24. The following anonymous cases have been reported:—

The fact that the deceased person's hands were tied by a cord in a sailor's knot is relevant in a prosecution in which a sailor is tried for the homicide.

A piece of rope, found near the deceased, was proved, in a homicide case, to match a piece of rope found on the person of the accused, and the two pieces appeared to have been carelessly cut apart. This, however, was met by the testimony of a rope-maker, that one piece was twisted to the right and another to the left.

It is also relevant to prove that the room in which the accused slept on the night of the homicide showed marks indicating that it had been

stealthily left during the night; that when the crime was committed by the aid of chloroform the accused, shortly afterwards, smelt strongly of chloroform; that fragments of clothes torn from the assailant in the struggle matched fragments in possession of the accused; that a dog belonging to him was seen prowling about the place of crime soon after its commission.

Other cases are referred to supra, §§ 24, 764 *et seq.*

A witness who, soon after a homicide, had taken a pair of shoes from the defendant's house, one of which, as the government contended, fitted a track supposed to have been made by the murderer, was permitted to testify that the shoes appeared as if they had recently been washed. It was ruled that the admission of this testimony afforded no ground of exception. *Com. v. Sturtivant*, 117 Mass. 122.

⁶ *Whaley v. State*, 11 Ga. 123. But see supra, § 682.

§ 796. The character of footprints leading to the scene of murder, and their correspondence with the defendant's feet, may be put in evidence in cases when the defendant's agency is disputed.¹ Such evidence is not by it-

Footprints
and other
marks on
soil.

¹ Com. v. Pope, 103 Mass. 440; Murphy v. People, 63 N. Y. 590; State v. Graham, 74 N. C. 646; State v. England, 78 N. C. 552; Campbell v. State, 23 Ala. 44; Campbell v. State, 55 Ala. 80.

It is within the discretion of the court, when the question whether the defendant could have made certain footprints, to permit him to make tracks with his naked feet on the ground as tests. Campbell v. State, 55 Ala. 80.

In Judge Landon's charge in People v. Billings, Saratoga, 1878, we have the following:—

"This case affords abundant illustrations of circumstantial evidence. Here is a flower-bed newly spaded. A heavy rain falls upon it Tuesday afternoon. You know that flower-bed must be wet as a consequence of that rain. If, on the following morning, there are footprints, distinct and deeply sunken, in the flower-bed, you conclude somebody must have stepped there since the rain, otherwise the tracks would not have been so deep and distinct; otherwise the rain would have washed them out. But if you see two of the footprints are like each other and different from a third one, you conclude two persons have stepped in that flower-bed. Two of the prints may have peculiar impressions around the heel, as if the boot heel had a sort of rim projecting around it, and you conclude the man who stepped there wore a boot having such a projecting rim. If upon close inspection you find in those foot-

prints a peculiar mark, as if the boot had a sharp triangular point running out on the tap or sole of the boot, you conclude the man who made the tracks wore a boot corresponding with those impressions. Do those footprints lead along to the corner of the garden and to the garden fence? You conclude so the man walked. Is there mud or dirt upon the fence, and do the tracks seem to stop at that fence? You conclude the man got over the fence there. Is there an orchard beyond with a heavy tuft of grass or sod upon it? You conclude he may have passed in there, where the sod would not retain the impression. You conclude so, since the man is not there, since, perhaps, there are no returning footsteps. You pass to the next field, a corn-field recently ploughed. You pass along its south fence, and you find now and then like tracks. You think the same man has been along there. Some of these tracks are four feet apart. You reason upon them. Did the man run, and if he ran, why did he run? Do you find tracks of both feet brought together? You reason, did the man stop, and if he stopped why did he stop? Was it to listen, and if he listened what was it he heard—a cry, a shriek, or the running of many feet? But I need not pursue these illustrations further to enable you to understand the nature and force of circumstantial evidence. You see at once, it only requires you to reason in a natural way upon the facts proved."

self of any independent strength,¹ but is admissible with other proof as tending to make out a case.²

When the question of adaptation of the foot to tracks is at issue, and where, at a preliminary hearing before a magistrate, a party under suspicion was compelled to allow his foot to be placed in the track, it was held that the results of the experiment could afterwards be detailed on trial.³ But he cannot be compelled to place his foot in clay for experimental purposes during the final trial.⁴

§ 797. When there is an inspection of the scene of guilt, it must be shown what changes, if any, have taken place since the guilty act.⁵ The jury may be taken to view the premises,⁶ but the visit must be in the presence of

Scene of
guilt and
view of
jury.

¹ R. v. Britton, 1 F. & F. 354.

² See remarks of Wells, J., in Com. v. Sturtivant, Whart. on Hom. App.

Mr. Wills (Cir. Ev. p. 122) says: "A farm laborer was tried for the murder of a young woman, a domestic servant living in the same service. A little before seven in the evening she went on an errand to take some barm to a neighboring house about two hundred yards distant, but it not being wanted she did not leave it, and set out about seven o'clock on her way back. Being about to leave her situation that evening, she had requested the prisoner to carry her box to the gardener's house, about a quarter of a mile distant. Soon after she set out on her errand the prisoner followed her carrying her box, but did not reach the gardener's cottage until after eight. On the following morning she was found lying on her back, drowned in a shallow pit near a foot-path leading from her master's house to the gardener's cottage. There were marks of violence on her person, and one of her shoes and the jug in which she had carried the barm were found near the pit. Barm was also found spilt near the spot, and there were marks of much trampling, and chaff and grains of wheat were scattered

about, which were material facts, the prisoner having been engaged the day before in threshing wheat. Impressions were found in the soil, which was stiff and retentive, of the knee of a man who had worn breeches made of striped corduroy, and patched with the same material, but the patch was not set on straight, the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstances exactly corresponded with the prisoner's dress. The prisoner denied that he had seen the deceased after she left the house on her errand, and stated that he had been, in the interval before his arrival at the gardener's house, in company with an acquaintance whom he had met with on the road; but it was proved that the person referred to at the time in question was at work thirty miles off. He was convicted and executed."

³ State v. Graham, 74 N. C. 646; Walker v. State, 7 Tex. Ap. 246.

⁴ Stokes v. State, 5 Bax. 619. *Supra*, § 312.

⁵ State v. Knapp, 45 N. H. 148.

⁶ See Mass. Gen. Stat. c. 172, § 9; 5 Cush. 298; Chute v. State, 19 Minn. 271; Fleming v. State, 11 Ind. 234.

the accused.¹ The view may be granted after the judge has summed up the case.² If a part of the jury are allowed to go by themselves to the view, this is error.³

§ 798. The inferences we have just noticed are not limited to cases of homicide. Footprints are available as cumulative proof of identity in all cases where identity is to be proved. In the Tichborne case, one of the strongest proofs against the claimant was that his foot could not in any way be made to fit the measurements used to make the shoes of Roger Tichborne. In an unreported New Jersey case of arson, elsewhere noticed, in which, while there were two tracks of horses' shoes coming from the place burned, there were no tracks going to it, it was a principal point against the accused that his horse was found, the day after the firing, with marks on his hoofs which showed that the shoes had recently been reversed so that he could have been ridden to the spot with shoes reversed, and from it with the shoes in the usual position. Similar inferences may be drawn from other extrinsic facts. Breaking, in burglary, for instance, may be shown by marks on the building broken into ;⁴ rape, by the condition of the place of offence, and of the dress of the accused ;⁵ abortion, by the possession of the mechanism of the crime, and by traces on the party injured of wounds from such mechanism ;⁶ arson, from possession of means of ignition and from the traces of combustion, as well as from other burnings ;⁷ robbery, from the violence done to the property seized, as well as to the clothes and person of the prosecutor ;⁸ larceny, from facts indicating stealth and concealment ;⁹ malice, in malicious mischief, from marks of peculiar malignity on the thing injured.¹⁰ But in all cases where conviction is sought on the ground that the defendant had opportunities for committing the crime, it must be remembered that proof of this class is only

¹ State v. Bertin, 24 La. An. 46.

² R. v. Martin, L. R. 1 C. C. 178.

³ Ruloff v. People, 18 N. Y. 179; Eastwood v. People, 3 Parker C. R. 25. As to diagrams see supra, § 545; State v. Jerome, 33 Conn. 265. See R. v. Haseltine, 12 Cox, 404, approving of experiments to test the effect of fire in arson cases.

⁴ Infra, § 799; Whart. Crim. Law, 8th ed. § 759.

⁵ Whart. Crim. Law, 8th ed. §§ 566, 576 a.

⁶ Ibid. § 598. Infra, § 799.

⁷ Whart. Crim. Law, 8th ed. §§ 826-831.

⁸ Ibid. §§ 849-50.

⁹ Ibid. §§ 895, 908, 923, 926.

¹⁰ Ibid. §§ 1071, 1082 c.

of value when offered either to anticipate or to rebut the defence that the defendant had no such opportunities. That a man could have done a wrongful act is, by itself, no sufficient proof that he did it.¹

§ 799. As has been already observed, it is relevant to put in evidence any instruments of crime, in the defendant's possession, indicating preparations on his part to com-
mit the suspected offence.² Nor is proof of the posses-

Inference
from incul-
patory in-
struments.

¹ "The infirmative hypotheses affecting *motives* to commit an offence are applicable, also, to *means* and *opportunities* of committing it; and some unhappy cases show the danger of placing undue reliance on them. A female servant was charged with having murdered her mistress. No persons were in the house but the deceased and the prisoner, and the doors and windows were closed and secure as usual. The prisoner was condemned and executed, chiefly on the presumption that no one else could have had access to the house; but it afterwards appeared, by the confession of one of the real murderers, that they had gained admittance into the house, which was situated in a narrow street, by means of a board thrust across the street from an upper window of an opposite house, to an upper window of that in which the deceased lived; and that, having committed the murder, they retreated the same way, leaving no traces behind them." Stark. Ev. 865; Best's Ev. 572.

² Com. v. Wilson, 2 Cush. 590; Com. v. Blair, 126 Mass. 40; People v. Larned, 3 Selden, 445; People v. Winters, 29 Cal. 658. Supra, §§ 32-9.

Upon the trial of an indictment for an illegal operation upon a woman, certain surgical instruments and a speculum chair, found in the defendant's house, were exhibited to the jury. There was evidence that the chair had been used in performing the

operation, and medical experts were allowed to testify that the surgical instruments were adapted to producing abortions, although none of them could be said to be so exactly designed for such use as not to be appropriate also for use in lawful acts of surgery. It was held by the Supreme Court that the defendant had no ground of exception to the admission of this evidence. Com. v. Brown, 121 Mass. 69. To the same effect is Com. v. Blair, 126 Mass. 40.

In conformity with the view in the text, on the trial of an indictment for breaking and entering a building and stealing therefrom, a number of burglarious tools and implements, found together in the possession of the defendant, at the time of his arrest, may be brought into court and exhibited to the jury, although some of them only, and not the residue, are adapted to the commission of the particular offence in question. Com. v. Williams, 2 Cush. 582, 583. In a case of burglary, where the thief gained admittance into the house by opening a window with a penknife, which was broken in the attempt, and a part of the blade left sticking in the window frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner, and was held proper evidence. And so evidence was received to trace the implements with which the burglary had been com-

sion of such instruments excluded by the fact that it implicates the defendant in independent crimes.¹

VIII. PHYSICAL PRESUMPTIONS.

§ 800. Boys under fourteen, and girls under twelve, are by the English common law presumed incapable of matrimonial consent; and this presumption is irrebuttable. The same limit is prescribed by the Roman law, and by the Council of Trent.²

Infants
presumed
incapable
of matri-
mony.

§ 801. Children under seven are presumed irrebuttably to be incapable of crime; ³ between seven and fourteen the presumption is rebuttable by proof that the defendant is *capax doli*.⁴ A boy under fourteen is presumed incapable of

And so of
crime.

mitted to the defendant's home. *People v. Larned*, 3 Selden, 445.

¹ *Supra*, §§ 39 *et seq.*

In *Ruloff's* case, decided in New York, in 1871, the conviction rested in a large measure on the production of implements found in the prisoner's room, and on photographic likenesses of the deceased. The applicatory law is thus stated by Judge Allen: "Objection was made, upon the trial, to the production in evidence of certain implements and papers found in the room and desk of the prisoner. Both the room and desk were used somewhat in common by him and one of his associates, but he was the chief occupant. The articles were taken some time after his arrest, and evidence was given tending to show that he had the key of the room, and showing how the room had been kept during his absence; and the prisoner, upon the trial, admitted the possession of one of the implements. Other evidence was given, also tending to connect the prisoner with the articles found in his room, and the question of fact was properly submitted to the jury upon that question. The ratchet-drill, which, it was claimed, the bits with which the entry into the store

was effected fitted, the prisoner admitted on the trial had been in his possession as a new invention and a curious thing. This alone was some evidence that the articles found with the drill were there while the prisoner occupied the room and used the desk, especially with the other evidence tending to show that the room had remained locked from the time he left until the articles were found and taken away." *Ruloff v. People*, 45 N. Y. 213.

² Whart. Conf. of L. § 147.

³ 1 Hale, 19, 20; 4 Bl. Com. 23; *R. v. Giles*, 1 Mood. C. C. 166; *Marsh v. Loader*, 14 C. B. (N. S.) 535; *R. v. Owen*, 4 C. & P. 236; *People v. Townsend*, 3 Hill (N. Y.), 479; *State v. Goin*, 9 Humph. 175; *Godfrey v. State*, 31 Ala. 323.

⁴ *R. v. Smith*, 1 Cox C. C. 260; *Com. v. Mead*, 10 Allen, 398; 1 Green Cr. R. 402.

In England this presumption is not affected by the Act of 24 & 25 Vict. c. 100, ss. 48, 50. *R. v. Groombridge*, 7 C. & P. 582, per Gaslee, J., and *Ld. Abinger*; and it applies to the offence of carnally abusing a girl under ten years of age. *R. v. Jordan*, 9 C. & P. 118, per Williams, J. But if

rape, as principal in the first degree.¹ Nor can he, according to the prevalent view, be convicted of an assault with intent to ravish.²

As an infant under seven is not *capax doli*, an action for false imprisonment lies for the arrest of such an infant under charge of felony.³

§ 802. Identity of name is not by itself, when the name is common, and when it is borne by several persons in the same circle of society, sufficient to sustain a conclusion of identity of person. The inference, however, rises in strength with circumstances indicating the improbability of there being two persons of the same name at the same place at the same time, and when there is no proof that there is any other person bearing the name. Names, also, with other circumstances, are facts from which identity can be presumed. Where a father and son bear the same name, the name, if used without any addition, is presumed to indicate the father.⁴

§ 803. Permanence in individuality is the basis of all our inferences as to identity. In order to make these inferences we assume two things: (1.) That no two individuals are precisely alike, each individual having his perceptible differentia; ⁵ (2.) That these distinctive

Identity
inferable
from
name.

Continu-
ousness of
appearance
and of
voice.

the boy have a mischievous discretion, he may be a principal in the second degree. 1 Hale, 630. The pathic may be convicted of an unnatural crime, though the agent be under fourteen. *R. v. Allen*, 1 Den. C. C. 364; 2 C. & K. 869.

¹ 1 Hale, 630; *R. v. Eldershaw*, 3 C. & P. 396; *R. v. Groombridge*, 7 C. & P. 582; *R. v. Phillips*, 8 C. & P. 736; *R. v. Jordan*, 9 C. & P. 118.

² Whart. Crim. Law, 8th ed. § 551; *R. v. Eldershaw*, 3 C. & P. 305; *State v. Sam*, Winston N. C. 300; *State v. Pugh*, 7 Jones N. C. 61; though see *Com. v. Green*, 2 Pick. 380; *People v. Randolph*, 2 Park. C. R. 213.

³ *Marsh v. Loader*, 14 C. B. (N. S.) 535.

⁴ See Whart. on Ev. § 1273; *Shepherd v. State*, 72 Ill. 480; *Richardson v. People*, 85 Ill. 495.

⁵ “The specific gravity of any elementary substance, the proportions in which such substances are chemically united into compounds, the definite forms into which they crystallize, the modes of action or affinities of different reagents, and many other similar instances of nature’s work in this province, are precisely similar to each other; they do not vary even by a hair’s breadth.

“Far otherwise is it in the world of living organisms, where variety is the rule and uniformity is the exception; nay, it is not even the exception, for not one such exception — that is the case of no two indiscernibles — can be produced. So far as I know, Leibnitz is the only philosopher of modern times who has noticed and duly emphasized this wonderful fact; for the

features are not capable of voluntary change; and that he who possesses these features to-day may be inferred to have possessed them yesterday, and that he who possessed them yesterday may be inferred to possess them to-day. The first of these assumptions — that of the apparent distinctiveness of all human beings, so that no two persons are precisely alike — is one of the axioms on which society rests. It may be possible that there are adults so precisely alike as to be undistinguishable even by those who know them best; but the cases of such supposed identity are so imperfectly substantiated, that it is far more probable that the witnesses testifying were mistaken than that such similitude actually existed. There are cases, also, in which mimics have been able to assume for a short time the appearance and expression of others, or to obliterate their own peculiar features, but these deceptions can be maintained but for very brief periods, and vanish when tried by close tests. We have a right to hold, in fact, that it is an absolute law that each individual should have certain features assigned to him by which he is distinguishable from all others; and that these features, while subject to gradual modification by age, should yet retain their characteristics so as to be distinguishable for months, even under the most artful disguises.¹ The whole figure may be changed by dress; the hair may be cut off or dyed; yet the eyes, the nose, the mouth, the voice remain, each of which possesses traits which cannot be defaced by any means short of destruction. “The Trimmer,” says Macaulay, when narrating, in a striking passage, the arrest

statement of it is one of the fundamental axioms on which his whole system is founded. . . . The illustration he employed while discussing the subject in the presence of the Princess Caroline, as they were walking in a garden together, was that no leaves precisely alike could be found on any bush. Another gentleman who was present took up the challenge, but after a long search was obliged to confess that the statement of Leibnitz was probably correct. A better illustration, as it seems to me, might be taken from the human face. Here all

the differences are crowded together within narrow compass, say within the limits of six by ten inches, and all the main features, brow, nose, eyes, cheek, mouth, and chin, are constructed essentially on the same general pattern. But what a marvellous wealth of difference underlies all this uniformity! Among the many millions of human faces that people this earth, no two can be found so nearly alike but that they are easily distinguished at a glance.” Prof. Bowen in *Princeton Rev.* May, 1880, p. 334.

¹ See *Brown v. Com.* 76 Penn. St. 319.

of Jeffreys, "was walking through Wapping, when he saw a well-known face looking out of the window of an ale-house. He could not be deceived. The eyebrows, indeed, had been shaved away. The dress was that of a common sailor from Newcastle, and black with coal dust; but there was no mistaking the savage eye and mouth of Jeffreys." But the face is not the only test. Voices are equally distinguishable, and their distinguishability has been made the basis of convictions in criminal courts.¹ A much more difficult point arises when we take up the question of the change of appearance by time. Undoubtedly the presumption of continuance, which is now immediately before us, extends so far as to justify us in saying that a person will continue to look to-morrow, next week, or even next month, as he looks to-day. When we take longer periods, however, the presumption fades gradually away. All persons who have reached middle life, and who have been absent for years from their school or college companions, are aware what alterative effects ten or fifteen years have on the countenance, and how after forty or fifty years the features which once constituted individuality have acquired such new expressions as to defy recognition. It may be said that this is because of the weakened memory of the observer. But that there is a material and sometimes decisive change in the parties observed arises from the necessary action of time on the countenance, and is illustrated by photographs taken of the same person at different stages of life. We must remember, also, that while two persons (*i. e.* twins) may be undistinguishable, except by near relatives, at an early period

¹ In *Com. v. Scott*, 123 Mass. 222, an effort was made to identify by the voice the burglars who had broken into the Northampton Bank. The cashier testified that he had been compelled by masked burglars to open the vault, and stated that he could identify them by the voice. To show that there was no peculiarity in his voice, the defendant Scott was then asked by his counsel to stand up and repeat something, which he did, and the witness said he was suppressing his voice. Scott was then told by his

counsel to "speak it right out." The judge then said: "I do not think this is competent." The counsel for the defendants contended that he had a right to have the peculiarities of the defendants' voices pointed out by the witness, and that for this purpose the voices themselves were competent. The judge ruled that though identification could be by voice, experiments in court were inadmissible. *King v. Donahoe*, 110 Mass. 155. In *Brown v. Com.* 76 Penn. St. 319, a confession was identified by voice.

of life, they diverge, as they grow older, and gradually assume distinct types. We must therefore hold that the presumption of continuance, when invoked in questions of identity, cannot be extended further than to imply such a continuance of appearance as is subject to the usual modifications of time.¹

¹ As to proof of identity see *supra*, §§ 13, 378. For identification by inspection see *supra*, § 312.

“Now, the question being one of identity, a good deal has been said about the doubtful nature of the inquiry, and of the only proof which, generally speaking, can be produced of identity; and I quite agree that it is one of the most difficult questions with which courts of justice and juries have to deal, and that it is one of those questions upon which they are occasionally liable to go wrong. But ordinary cases of identity are very different, indeed, from the present. Frequently a man is sworn to who has been seen only for a moment, or for a very short space of time. A man stops you on the road, puts a pistol to your head, and robs you of your watch or your purse; a man seizes you by the throat, and while you are half strangled, his confederate rifles your pockets; a burglar invades your house by night, and you have only a rapid glance to enable you to know his features. In all these cases the opportunity of observing is so brief that mistake is possible, and yet the lives and safety of people would not be secure unless we acted on the recollection of features so acquired and so retained; and it is done every day. There are instances, indeed, in which the supposed recollection of the features of a person accused has proved faulty. I have known such instances myself. I remember to have been present years ago at a trial, which I never shall forget, on the western circuit, in which two men were tried for

murder. They were both convicted, one upon evidence of identity given by numerous persons, who all swore to the man. He was convicted, and if execution had followed upon conviction with the rapidity it did at an earlier time, the man would have been executed. It was proved afterwards, beyond all possibility of a doubt, that those who had sworn to the identity of the man were mistaken. He had been taken up for picking pockets on the day the murder was committed, hundreds of miles away from the place; he was in confinement at the time under the latter charge; there was not the slightest doubt in the world about it. The man was, of course, reprieved. I tried a case not very long ago at Hartford, where a man was charged with night poaching, and with a most serious assault upon a keeper, — the keeper having been most cruelly used. The keeper was a most respectable man, head-keeper of a nobleman in the country. Nobody doubted his perfect veracity and intention to speak the truth, and he swore most positively to the man. I had not the slightest doubt of his testimony. The jury convicted the prisoner. It turned out afterwards that we were all mistaken. It was shown satisfactorily that he had been mistaken for another man. Therefore I quite agree with what was said by the learned counsel for the defendant, that in ordinary cases identity is a very difficult point; and here it is the question at issue in this case. But in the cases I am speaking of, you have merely the evidence of persons who have had a short and

§ 804. After death, the presumption of continuance of appearance casual opportunity of becoming acquainted with the appearance of the individual. Here we have a much wider range of proof; but at the same time the inquiry is one which has its own peculiar difficulties; for whereas in the cases to which I have been referring the recollection is called forth in a court of justice speedily after the event, here we are dealing with the identity of a man alleged to have been dead ever since 1854, — twenty years ago, — and the asserted identity of another man who for a great number of years has disappeared from the knowledge of all those who knew the undoubted man, from the year 1854, at all events, until the year 1866 or 1867. And if in ordinary cases evidence of identity is calculated to mislead us or embarrass us, how much more must it do so in a case like the present, where you have a host of witnesses on the one side confronted with an equal host on the other; where, with the exception of the mother, you have an entire family, — I say an entire family, for I attach no value to the opinion of Mr. Biddulph, — a body of persons who were as familiar with Roger Tichborne, whose existence is in dispute, as it is possible for people to be, and who deny the identity of the defendant; and, on the other hand, the mother of the undoubted Roger Tichborne asserting that he is her son; a host of witnesses coming forward to say that he is not the man, and an equal, or perhaps a greater number coming forward to say that he is, while the matter is still further complicated by this extraordinary circumstance, that while the defendant says, ‘I am Roger Tichborne,’ and produces numerous witnesses to say that he is, and another vast array of witnesses come forward to say he is not, the identity of the man, who thus claims to be Roger Tichborne, with a totally different individual, namely, Arthur Orton, is in like manner asserted and contested. So that the defendant stands, as it were, between two persons, — between Arthur Orton on the one hand, and Roger Tichborne on the other; and while he asserts he is Roger Tichborne, a host of witnesses declare that he is Arthur Orton; so that the same conflict which occurs with reference to his identity with Roger Tichborne occurs with reference to his identity with Arthur Orton; and you have witness after witness produced to say he is Arthur Orton and witness after witness to say he is not.” Cockburn, C. J., charge in Tichborne case, p. 12.

In 10 Cent. L. J. 123, we have the following: —

“Take the case of twin children; you see two beautiful little girls pass your door day after day, dressed alike, the same size, hair alike, faces cast upon exactly the same model, complexion and expression of countenance identical. You are told that one is Nannie and the other Jeannette, but unless some one points out the difference, though you fancy you see some difference, when you meet them separately you will never know when you meet Nannie and when Jeannette. But stand them before you together side by side, look carefully into their faces, first the one and then the other, and you soon observe a difference, which will enable you forever to distinguish them; the one has brown eyes, the other blue; or the one has some mark or other peculiarity of face, which, being laid away in your memory forever, enables you to see the difference and distinguish the two apart. But this comes from com-

ance rapidly weakens.¹ Even when death is sudden, there is an immediate change of countenance; and we notice instantaneously not only the loss of expressions we associated with the living person, but the starting forth of new expressions, constituting heretofore unperceived likenesses with other members of the same family.

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parison, for you would never discover the difference by casually seeing them apart. And so in reference to the subject of the identity of animals. What lawyer who has practised in the rural districts has not seen the most excited litigation as to the identity of a horse, a cow, or even a pig. But never in any case where comparison by juxtaposition and collation were practicable. These controversies arise in this way: farm stock run at large, an animal strays away, the owner in his search finds in the forest with the herd of his neighbors one resembling it, and, as he honestly thinks, the same, and drives it home and puts it in his close. The neighbor seeing it there says it is his, and the resemblance is so striking that there is no lack of proof of identity on either side, and the litigation becomes bitter and stubborn. And this all for want of the opportunity of comparison. The writer remembers an instance where, after a bitter litigation between two influential farmers, one of whom had gone into the forest and taken a colt which he alleged had been missing since spring, but which was claimed by another, the title to which the taker maintained and had quieted in the suit. But what was his surprise, after the controversy was all over, to have another colt, which he was bound to own was his, come home to him, when, he being an honest man, restored to the other claimant the one he had wrongfully wrested from him at the end of a lawsuit.

The comparison of the animals at once showed the honest farmer where the truth was and where the ownership. But these illustrations might be multiplied *ad infinitum*."

¹ In September, 1826, William Morgan, a man of roving habits, who had been connected with a Masonic Lodge in Western New York, quarrelled with his Masonic associates, and took part in the publication of a book in which their secrets were disclosed. This was resented by his old friends, and he was subjected, it was said, to persecutions, which were followed by his disappearance on September 12, 1826. It was reported that he had been kidnapped; and the country was soon in a blaze of excitement. What became of him was never known: the theory of one side was that the alleged abduction was a trick on his part to elude his creditors; the theory, on the other side that he was carried off by Masons and drowned in Niagara River. In a few months the anti-Mason party was organized so effectively that it controlled not only municipal but state elections in New York and Vermont; holding the balance of power in Pennsylvania. There was, however, no proof that Morgan had been killed, though this was the firm conviction of a majority of the community. In October, 1827, thirteen months after Morgan's abduction, the dead body of a man was found on the beach of Lake Ontario, forty miles east of Fort Niagara. There is now no question that this was the body of Timothy Monroe,

From that moment "the effacing fingers" of time work rapidly. There is but little continuity of appearance, and gradually all

a Canadian farmer, who had been drowned in that vicinity a few days before, in consequence of the upsetting of his boat. This was afterwards shown by physical signs: by his clothes; by extrinsic facts; and there was nothing about the body to indicate a struggle with violence such as would have been necessary to cast him against his will in the water. No proof, however, of identity being then produced, the coroner's inquest found the body to be that of a "person unknown." In the mean time a rumor was spread that the body was that of Morgan; and a second inquest was summoned, before which very extraordinary evidence was produced. The remains had been tampered with; the head and cheeks had been shaved; and a dentist was examined who produced two teeth he claimed to have extracted from Morgan's mouth, and which were said to fit into the mouth of the deceased. But confirmatory facts of this kind were not needed to back up the convictions of the numerous witnesses, who, under the strain of high party excitement, believed that they saw in the corpse the body of the murdered victim of Masonry. The second inquest found promptly that the body was that of Morgan; and this was followed by an immense funeral at Batavia, which was one of the most effective incidents in the political campaign. Not long afterwards, however, a third inquest took place. "There," so states a review of these remarkable proceedings in the New York Sun of May 16, 1880, "were the widow of Timothy Monroe, his son, and the man Cron, who was with him in the boat when he was drowned. They had been induced to come from Canada. The clothing of

the dead man, which had been nailed up in a box when he was first buried, was submitted to the three witnesses. They each and all recognized every article as Timothy Monroe's. The wife, with great emotion, identified her mending and darning of some of the garments. The eking out of one leg of the trousers with a different piece of cloth, because the pattern, bought by the son, had been scant, was dwelt on by the son and his mother. A portion of the contents of the pockets were religious tracts in English typography, and bearing the imprint of the British Tract Society, such tracts as then were circulated only in Canada. All three testified to the drowned man's being full whiskered and heavily haired upon his crown. Then came the formal inquest at Batavia. All of the coroner's jury were anti-Masons except two. The jury sat in the midst of an immense concourse of people. Weed and his Morgan Committee were conspicuously absent. Monroe's widow, his son, and Cron positively identified the remains to be Timothy Monroe's. His clothing was identified by each of them. The tracts were put in evidence." The evidence of the dentist was met by the proof that the dead man had lost five of his teeth instead of two. "The Potters, father and son, proved that he was whiskered and not bald when found, and that when he was dug up, preparatory to the political inquest, he was whiskered, and not bald. The testimony was overwhelming. The verdict of the jury was unanimous." A pamphlet on this topic by Mr. Henry O'Rielly was published by the American News Company, in 1880.

identification by expression is impossible. The eye, also, is gone; the mouth, even if the lips remain, retains no longer those undescribable yet unmistakable peculiarities which distinguished the individual when living. We must then fall back upon the more undefaceable portions of the frame: the size of the body, the shape of the skull, the indications the skeleton offers of age. The hair and the teeth, however, form the chief means of recognition. The hair is chiefly valuable in disproving alleged identity, as where gray hair is found on a body claimed to be that of a person whose hair at death was as yet auburn or black; and cases are known, such as those of Lucrezia Borgia and of Cromwell, in which identification was claimed by comparing hair taken from a body after death, with a lock taken a short time before death from the living person. But the chief mode of identification, when the features of the deceased have lost their shape, is by the teeth. Peculiarities as to the teeth, though by no means conclusive, since many persons may have teeth of the same kind, form admissible modes of identification. And proof of this kind is strengthened by artificial marks on teeth, produced by dentistry; and may be made still more cogent by the production of dentists' casts, and by the testimony of dentists by whom particular operations were effected.¹

¹ See generally on this topic 2 Wh. & St. Med. Jur. §§ 321, 1022; *R. v. Cheverton*, 2 F. & F. 833; *Lindsay v. People*, 63 N. Y. 143; *Murphy v. People*, 63 N. Y. 590; *Foster v. People*, 63 N. Y. 619; *Hamby v. State*, 36 Tex. 523. For a case of identification of a head preserved in alcohol see *State v. Vincent*, 24 Iowa, 570. *Supra*, § 326.

A brother of the deceased, on a trial for murder, testified that, five months after the alleged murder, he saw a body claimed to be the body of the deceased, and examined it; he testified to several points of resemblance. He was asked by the government whether it was, in his opinion, the body of the murdered man. It was held that the question was incompetent, the question being for the jury,

the body having been much decomposed and he having stated all the points of resemblance. *People v. Wilson*, 3 Parker C. R. 199.

In Lowenstein's case (Albany, 1874, p. 332), Judge Learned thus sums up the evidence of identity of the remains: "The question for you is, was that body John D. Weston's body? The facts are, first, that it was the body of a one-armed man; the same arm was gone in both cases. Another fact which the physicians testify to is the peculiar flexibility of the finger. There is some discrepancy as to whether it was the same finger in the body as with Weston, I think. The third peculiarity was the separation of the teeth; they were further apart than usual. That peculiarity is said to have existed in both. As to the

§ 805. We have already had occasion to observe that photographs, as well as pictures, are admissible, when duly verified, in order to identify both living and dead.¹ Their weight, however, when admitted, depends largely

Inference
as to pho-
tographs.

size and mode of wearing a moustache, the man is said to be, I think, of such a size as to correspond with John D. Weston. Then you have the further fact about his coat, pantaloons, and vest, and I think the shoes and hat and the alpaca coat; they are all identified by John Weston's wife. You will remember if I am wrong in the details. She testified to shortening the pantaloons and to mending the coat. There is also a pair of eyeglasses which I think she identified. At any rate she says she fastened a similar pair to his suspenders."

In Goldsborough's case, reported in Warren's *Miscellanies*, Blackwood's ed. 1845, p. 93, the evidence was that the murder of Huntley, the deceased, was committed in 1839. The body was found in 1841, by an open drain. The chief point of identification relied on was a peculiar tooth which Huntley had on one side of his head. Only one half of the bones of the supposed body were found, and none of the clothing was discovered. The skull was fractured and filled with dirt, and not a single particle of flesh or muscle remained. As to the tooth, Mr. Warren says (pp. 106-7):—

"When first discovered, it would appear certain that there was a very prominent tooth on the left side of the lower jaw, which arrested the attention of all those who saw it; but soon afterwards, owing to the inconceivable carelessness and stupidity of those intrusted with the custody of such all-important articles, and who permitted every idle visitor to have

free access to them, the tooth in question, alas, was lost! I confess I have seldom experienced such a rising of indignation as when this remarkable deficiency of evidence was thus accounted for."

"He," the judge, "left it fairly to them," the jury, "to judge whether sufficient had been done to satisfy them beyond all *reasonable* doubt that the bones produced were those of Huntley, but accompanied by a strong expression of his own opinion that the evidence was of an unsatisfactory nature. Unless they were satisfied on *that* head there was an end of the case; for the very first step failed proving that Huntley was dead. If, however, on the whole of the facts, they should feel satisfied in the affirmative, then came the two other great questions in the case, Had Huntley been murdered? And by the prisoner at the bar?" The defendants were properly acquitted.

As to identification by teeth see further *Com. v. Webster*, Bemis's Report; *Lindsay v. People*, 63 N. Y. 143; *Morgan's case*, *supra*; and compare 2 Wh. & St. Med. Jur. §§ 289, 1218.

For identification by inspection see *supra*, § 312.

In the 5th ed. of Casper's *Gericht. Med.* (Liman's ed. Berlin, 1871, Bd. ii. s. 120), occur the following cases of identification of remains:—

Identification after Three separate Exhumations.—Schall was suspected of the robbery and murder of Ebermann, who had disappeared. At the first exhumation of the body claimed to be

¹ *Supra*, § 544.

upon extraneous circumstances. Not only must they be verified, as has just been noticed, but due allowance must be made for

that of Ebermann, a woman, a stranger in the neighborhood, swore that the body was that of her husband, who had recently disappeared, an allegation which was chargeable either to delusion on her part or to complicity with Schall. Five months afterwards the body was again exhumed, for the purpose of determining whether it exhibited certain tattoo marks similar to those proved to have been on the person of Ebermann; but decomposition had so far progressed as to make this method of identification unavailable. Two years and a half after the first burial, the head (which had been cut off in the murder) was for the third time exhumed; the ground being that Ebermann's mistress claimed that his teeth were so peculiar that she could at once identify them. The skull was submitted to Casper for examination. One question to be determined was whether the fatal shot had pierced from behind the left ear into the head. This question, from the shattered and decayed condition of the bones, could not be definitely answered. The teeth, however, remained unaffected by decay. These were recognized by the mistress of Ebermann at the first glance. To Casper was put the question whether the teeth met the description of them previously given by the brother of the deceased. He answered that there was a similarity, but not such as would justify, on this ground alone, a positive identification. The result of the third exhumation was to produce evidence consistent with the hypothesis of Schall's guilt, and, so far as concerns the testimony of the deceased's mistress, positively confirmatory of that hypothesis.

Identification after a Burial of Eleven

Years. — Mrs. V., a widow, died on May 20, 1848, after pains in the stomach and vomiting, which lasted for two days. Although reports of foul play were prevalent, no examination took place for eleven years, when these suspicions received such additional confirmation that proceedings were instituted against the husband of the deceased and his second wife. On March 30, 1859, the coffin was opened, and exhibited a human skeleton. The first point was to identify this with Mrs. V. Relatives of the deceased testified to the color of her hair, and that she had four artificial teeth, connected by a gold band. The testimony as to her clothing was immaterial, as in the coffin only a few fragments of stockings could be found. The coffin had decayed, and was filled with sand, among which were found shavings of wood, and vegetable substances, apparently laurel leaves, and twigs of a cone-bearing tree, *thuja*. In attempting to take out the body, the skull was detached, and with it a mass of blonde-reddish hair. The witnesses, however, hesitated to identify the hair, and declared that it must have been changed by its long burial, which was not impossible. But in taking the skull out of the sand, four artificial teeth, connected by a golden band, fell out, and these the witnesses at once positively identified as belonging to the deceased. Two firm back teeth still remained on the upper jaw, and in the under jaw eight teeth remained. No part of the body retained any odor. The remains of the upper and lower extremities were covered with a thin, sticky, inodorous, dark-brown substance. Search was in vain made for the contents of chest and stomach. The bones of

the fact that of some persons good photographs are rarely taken; that photographs taken of the same person in different lights or under different influences often do not resemble each other; and that photographs, as well as pictures, may be used as instruments of fraud. These considerations, however, go to the weight to be attached to the evidence when in. Of its right to be received as one of the circumstances from which identity can be determined, there is no question.¹ Photographs of scenery, when verified, are also admissible, though dependent, even more than photographs of faces, on the stand-point from which they are taken, and the conditions of light and shade under which they were made. In the Tichborne perjury case, the defence put in evidence a photograph of a "grotto," the character of which was involved in the issue; and this photograph was so unreliable as to invoke the severe criticism of the court. But the question of accuracy is for the jury: the photograph, if

the whole skeleton separated in being moved. No trace of an injury was discoverable on the bones. The sticky substance just noticed, together with the sand, were then set aside for chemical examination.

Identification Twenty-one Years after Death.—Of this a case, dependent upon peculiarities of the teeth, and of certain articles of the deceased found near his body, is given in *R. v. Clewes*, 4 C. & P. 221.

In an interesting North Carolina case (*State v. Williams*, 7 Jones N. C. 446), where shortly after the disappearance of the deceased, a woman named Peggy Hilton, human bones, and hair-pins, similar to some which she had shortly previously purchased, were found in a heap of burned logs near her house, it was held that there was evidence to go to the jury tending to establish the identity of the remains, and that their verdict establishing such identity would not be set aside.

A remarkable instance of confusion of testimony as to the identity of a

dead body is reported in 2 Wh. & St. Med. Jur. 3d ed. § 1239. The trial of Udderzook, in West Chester, Pennsylvania, in November, 1873, for the murder of Goss, hinged on the question whether certain remains, found shortly after the disappearance of Goss, were those of Goss. The question of this identity, and the weight to be allowed to inferential evidence as to the identification of human remains, are discussed with remarkable clearness and accuracy by Judge Butler, in his charge to the jury,—a charge which is given in full in the Appendix to Whart. on Hom.

¹ Supra, § 544; *Ruloff v. People*, 45 N. Y. 213-25; S. C., 5 Lansing, 261; and see also *Marcy v. Barnes*, 16 Gray, 161; *Taylor Will case*, 10 Abb. N. S. 300; 7 Alb. L. J. 50; *Shabile v. Ins. Co.* 9 Phila. 136; Whart. & St. Med. J. ii. § 1231. As to fallibility of photographs see *Popular Science Monthly*, April, 1875, p. 710; *Morse's Famous Trials*, 167; *Udderzook v. Com.* 76 Penn. St. 340; Appendix to Whart. on Hom.

proved to be fairly taken from the disputed object, is clearly admissible.¹

Identification by picture has been already noticed.²

§ 806. We have just noticed what may be called the objective conditions of identification; and of these the chief is that the object which it is sought to identify must have continued virtually the same during the time over which the witness's memory runs. We must, however, next remember, that the subjective conditions of identification — *i. e.* those depending upon the identifying witness — are to be considered before we come to a satisfactory result. These conditions are as follows: —

1. *Opportunities of Observation.*³ — A witness having but a casual acquaintance with a party is entitled to comparatively little weight after a short lapse of time. On the other hand, the most intimate acquaintance in former years will not insure accuracy in face of a powerful bias. Lady Tichborne was determined to find her lost child, and this determination so swayed her as to lead her to recognize an impostor as her son.

2. *Tenacity of Memory.*⁴ — Memory in children is more tenacious than with adults, but less discriminating, seizing often on features peculiarly evanescent. With adults a good deal depends upon natural gifts of discrimination, a good deal upon the object which we have in view in studying a face. Some men rarely forget a face they have once seen; and it used to be stated of General Scott, that he recollected the faces, though not the names, of soldiers of his command with whom his acquaintance was remote and slight. And there is no question that the power of distinguishing countenances may be excited by a particular crisis, matured by long practice. We recollect faces on which our attention has been concentrated in proportion to the vividness of the concentration. And police officers sometimes acquire the power of catching a glimpse in a moment that enables them to identify the person thus seen though afterwards skilfully disguised.⁵

3. *Capacity to make allowance for the Changes of Place and*

¹ Morse's Famous Trials, 167.

² Supra, §§ 312, 544.

³ Supra, § 377.

⁴ Supra, § 378.

⁵ See supra, §§ 378 *et seq.*

Time. — We do not readily recognize persons in places in which we do not expect them to be. And we must allow for the fact that when several years have passed, expressions familiar to us disappear, and unfamiliar expressions take their place.¹

4. *Freedom from Bias.* — The effect of bias, in this connection, has been already discussed.²

§ 807. That in questions of identity we have after all to go back to opinion has been already shown. A witness says, "The person in question was A." This is opinion. A jury infers, from marks of identity or dissimilarity, that identity is proved or disproved. This, again, is opinion, but it is opinion more primary and more reliable than that of witnesses speaking from the impressions produced on themselves. And recollecting how easily opinions as to identity are affected by prejudice, we must conclude, when we rest on the opinions of witnesses as our authority, that the two great constituents of reliability are (1.) familiarity with the person in controversy, and (2.) freedom from personal or party prejudice.³

§ 808. A witness swearing to the identity of a person produced with a person whom the witness had seen on a prior occasion may be tested by presenting to him a third person, as to whose similarity with the person in controversy he may be asked. Mr. Amos⁴ tells us, that a woman, on a trial for burglary in which her house and person had been plundered, swore directly to the pris-

Compara-
tive weight
of opin-
ions.

Witness's
memory
may be
tested by
exhibition
of other
persons.

¹ See fully *supra*, §§ 13, 27, 373.

² *Supra*, § 377.

³ In the Tichborne perjury prosecution (*R. v. Orton*, special report), before Cockburn, C. J., and the judges of the Queen's Bench, in 1876, the following distinctions were taken : —

Intimacy of acquaintance and closeness of relationship are not conclusive when there are strong family or social prejudices affecting the issue.

Opinions of witnesses are entitled to less weight than facts on which a jury base an inference, *e. g.* the size of the foot, as detailed by a shoemaker; marks on the body; habits and recol-

lections of the claimant, as compared with those of the person whom he is supposed to simulate.

That identity rests upon opinion see *supra*, §§ 13, 17; and see also *Com. v. Cunningham*, 104 Mass. 545. For questions of identity see Amos's *Great Oyer*, 206; Howell's *St. Tr.* vol. xxviii.; *Gentlemen's Mag.* Oct. 1772; *Ibid.* 1764, p. 404; *Ibid.* 1749, pp. 139, 185, 261; Spicer's *Judicial Dramas*, London, 1872, p. 114; Chambers's *Misc.* vol. iv.; *Lond. Med. Gazette*, vol. viii.; Salome Muller's case, Pamph. N. Orleans, 1846.

⁴ *Great Oyer*, &c. 265. As to inspection see *supra*, § 312.

oner being the offender ; but when the verdict of guilty was almost rendered, upon the sheriff suggesting that a man tried a day or two before had very much the same appearance, the latter was brought into court, and the prosecutrix immediately transferred her "conviction" from the one to the other. But there must be a direct presentation of such second person to the witness in presence of the court and jury. It is ordinarily inadmissible, in order to discredit proof of identity, to prove that there are other persons looking like the party in question within observation at the same time, such evidence being secondary. And it has been held in Massachusetts, that after evidence has been introduced by the defendant in a trial for murder, that the person alleged to have been murdered was seen alive afterwards, the government cannot call witnesses to prove that, about the time of the alleged murder, a person so strongly resembling the person alleged to have been murdered, as to have been mistaken for him by persons well acquainted with the latter, was seen in the neighborhood where the murder was alleged to have taken place.¹

§ 809. By the English common law, as accepted generally in the United States, at the close of a continuous absence abroad of seven years, during which time nothing is heard of the absent person, by those most likely to have heard of him if alive, death is presumed, as a presumption of law open to be rebutted by proof or counter presumptions.² But if there is no proof of unexplained absence, the mere lapse of time, even supposing that it would make the party eighty years old if living, is not by itself enough to prove death. It is otherwise when the party would have reached the limits beyond which life, according to ordinary observation, is improbable, though even when one hundred years is reached the conclusion is not absolute. With other circumstances (*e. g.* non-claimer of rights, or exposure to peculiar sickness or other calamity, with disappearance), death at a far

¹ *Com. v. Webster*, 5 Cush. 295. Union is equivalent to absence beyond seas. *Newman v. Jenkins*, 10 Pick. 515; *Innis v. Campbell*, 1 Rawle, 373. See cases cited in *Whart. Crim. Law*, 8th ed. § 1691. Absence unheard of in another State of the American

earlier period may be inferred. The presumption, in such cases, is of fact, not of law.¹

§ 810. The presumption of continuance of life, which exists in cases where a person living a given time since is inferred to be living now, is necessarily variable, readily yielding to the presumption, already noticed, derivable from the expiration of a period beyond which the continuance of life is improbable.² And the presumption of innocence may be invoked in criminal prosecutions, to either weaken or strengthen the presumption that the life of a particular person continues.³

§ 811. As we have just seen, if it is shown that a party, who has gone abroad, has not been heard from for seven years by those (if any) who, if he had been alive, would naturally have heard of him, he is presumed to be dead, unless the circumstances are such as to account for his not being heard from without assuming his death.⁴ But there is no presumption as to when, during the seven years, the party died;⁵ and the time of death is to be collected infer-

Continu-
ance of
life.

Period of
death to
be in-
ferred
from facts
of case.

¹ Whart. on Ev. § 1275.

² See *Bowden v. Henderson*, 2 Sm. & Giff. 360. *Supra*, § 809; *infra*, § 812.

³ *R. v. Twyning*, 2 B. & A. 386; *R. v. Lumley*, 1 L. R. C. C. 196; 38 L. J. M. C. 86; and 11 Cox, 274, S. C. See further *R. v. Jones*, 11 Cox, 358; compare, as to presumptions in bigamy prosecutions, Whart. Crim. Law, 8th ed. §§ 1691 *et seq.*; *R. v. Harborne*, 2 A. & E. 540; *R. v. Mansfield*, 1 Q. B. 449. See also *Lapsley v. Grierson*, 1 H. L. C. 498; *Kelly v. Drew*, 12 Allen, 107; *Williams's Est.* 8 Weekly Notes, 310. Presumption of continuance of the life of a first wife, in an indictment for bigamy, has been regarded, after two years, as neutralized by presumption of innocence. *Squire v. State*, 46 Ind. 458. See *Hull v. State*, 7 Tex. Ap. 593. That the party when last heard of was suffering with an incurable disease of necessary rapid termination may destroy the inference of continuance of life. *Ackerman, ex parte*, 2 Redf. 521.

⁴ Steph. Ev. art. 99, adopted in *Davis v. Briggs*, S. C. U. S. 1879; *White v. Mann*, 26 Me. 361; *Eagle v. Emmet*, 4 Bradf. N. Y. 117; *Merritt v. Thompson*, 1 Hilton N. Y. 550; *Clarke v. Canfield*, 15 N. J. Ch. 119; *Garden v. Garden*, 2 Houst. 574; *Gibbes v. Vincent*, 11 Rich. 323; *Ross v. Clore*, 3 Dana, 189; *Puckett v. State*, 1 Sneed, 355. See *Burr v. Sim*, 4 Whart. 150.

⁵ *Re Phene's Trusts*, L. R. 5 Ch. 150. See, to same effect, *Re Lewes's Trusts*, L. R. 11 Eq. 236; L. R. 6 Ch. Ap. 356, and 40 L. J. Ch. 602, S. C.; *Lambe v. Orton*, 29 L. J. Ch. 286; *Thomas v. Thomas*, 2 Drew. & Sm. 298; *In re Benham's Trusts*, 37 L. J. Ch. 265, per Rolt, L. J., reversing decision by Malins, V. C., as reported in 36 L. J. Ch. 502; L. R. 4 Eq. 416, S. C.; *In re Peck*, 29 L. J. Pr. & Mat. 95; *Dunn v. Snowden*, 32 L. J. Ch. 104; 2 Drew. & Sm. 201, S. C.; *Doe v. Nepean*, 5 B. & Ad. 86; 2 N. & M. 219, S. C.; *Ne-*

entially (supposing the seven years have elapsed as above stated) from all the facts of the case.¹

§ 812. It has been incidentally observed that, aside from the general presumption of death arising from unexplained absence abroad for seven years, certain facts have been noticed by the courts as affording grounds on which inferences of death, more or less strong, may rest.²

Among these facts may be noticed: Presence on board a ship known to have been lost at sea, the inference of death increasing with the length of time elapsing since the shipwreck ;³ exposure

pean v. Doe d. Knight, 2 M. & W. 894, in Ex. Ch.; 2 Smith L. C. 476, 492, 577, S. C. In this case Lord Denman, in pronouncing the judgment of the court, observes: "Inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances." 2 M. & W. 913, 914.

¹ White v. Mann, 26 Me. 370; Smith v. Knowlton, 11 N. H. 197; Stouvenel v. Stephens, 2 Daly (N. Y.), 319; McCartee v. Camel, 1 Barb. Ch. 456; Whiting v. Nicholl, 46 Ill. 241; Tisdale v. Ins. Co. 26 Iowa, 171; 28 Iowa, 12; State v. Moore, 11 Ired. 70; Spencer v. Roper, 13 Ired. (L.) 333; Hancock v. Ins. Co. 62 Mo. 26.

The return of a person, presumed to have been dead, after an absence of over seven years, during which he has not been heard from, avoids any acts done by his representatives without judicial authority. Mayhugh v. Rosenthal, 1 Cincin. 492. Supra, § 597; infra, § 813.

² Best on Evidence (1870), § 409. See R. v. Twining, 2 B. & A. 386; R. v. Harborne, 2 A. & E. 540. In the latter case Lord Denman said: "I must take this opportunity of saying that nothing can be more absurd than

the notion that there is to be any rigid presumption of law on such questions of facts, *without reference to accompanying circumstances, such, for instance, as the age or health of the party.* There can be no such strict presumption of law. It may be said: Suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Proof, therefore, that the party was alive twenty-five days before the second marriage, was held to overcome the presumption of innocence; which, on the other hand, prevailed in R. v. Twining against proof that the decedent had been heard of alive one year previous to the marriage. To the same effect is Lapsley v. Grierson, 1 H. L. C. 498.

³ See Cockburn, C. J., charge in R. v. Orton, for an able exposition of this presumption. Sillick v. Booth, 1 Y. & C. 117; Ommaney v. Stilwell, 23 Beav. 328; Patterson v. Black, 2 Park. on Ins. 919; Garry v. Post, 13 How. Pr. 118; Hudson v. Poindexter, 42 Miss. 304.

to peculiar perils, to which the death may be imputed if the party has not been subsequently heard from ; ignorance, as to such person, after due inquiry, of all persons likely to know of him if he were alive ; cessation in writing of letters, and of communications with relatives, in which case the presumption rises and falls with the domestic attachments of the party. Thus, death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears. It is scarcely necessary to say that evidence tending to rebut such presumption (*e. g.* proof that the alleged deceased had been heard from by letter, or was personally warned in a litigated suit) is always relevant for what it is worth. And in any view, death is a matter of inference, not of demonstration.¹

§ 813. In all questions relating to the authority of the parties to whom letters testamentary or administrative are granted, such letters are *prima facie* proof of the death of the alleged decedent, and are conclusive in cases where there is "no plea in abatement denying the death of (the principal), and setting up the consequent invalidity of the letters of administration." Such letters, also, are conclusive as to parties and privies ; but are nullities as to the alleged decedent supposing he should turn up alive.² And between strangers, when the fact of death is to be proved, letters of administration to his estate are *res inter alios acta*, and are inadmissible.³

Letters testamentary not collaterally proof of death.

§ 814. The question of death without issue is one of fact, to be determined on all the circumstances of the case.⁴

Death without issue.

§ 815. The length of time after which it is to be presumed that a ship, which has been unheard of, is lost, is to be determined by the inferences to be drawn from the concrete case. As a basis of proof, mere rumors are not sufficient ; there must be reliable information. If there are any indications of foundering, — *e. g.* a violent storm

Presumption of loss of ship from lapse of time.

¹ See Whart. on Ev. § 1277 for cases.

² See *supra*, § 597 ; Whart. on Ev. § 1278 ; *Mayhugh v. Rosenthal*, *ut supra*.

³ The cases will be found collected in Whart. on Ev. § 1278 ; *Lavin v. Emigrant Bank*, 9 Reporter, 541.

⁴ Whart. on Ev. § 1279.

at a particular point where the ship was, her unseaworthiness, remnants of wreck, — the loss may be put earlier than would be permissible if the ship had not been heard of at all. But there must be proof of the ship having left port.¹

IX. PRESUMPTIONS OF UNIFORMITY AND CONTINUANCE.

§ 816. When a particular condition of things (*e. g.* coverture), which by its nature is stationary, is shown to exist, the burden is on the party who seeks to prove its termination, supposing such termination be claimed to have occurred prematurely. It is sometimes said that in such cases the law presumes the continuance of the condition. Such, however, is not the case. Some conditions, such as infancy, are by their nature transient, while others, such as the possession of wealth, are subject to such vicissitudes that their continuance can only be contingently assigned. The question, as to all things liable to change, is not one of legal presumption, but of burden of proof.² And the conclusion is that when I once establish a juridical relation in itself not so limited as to time as to have expired before suit instituted, it is not necessary for me to prove the continuance of the relation. The burden is on my antagonist to prove that the relation has ceased to exist; though, as has just been said, there is no presumption of law against him which, when the evidence is all in, can outweigh any preponderance in such evidence in his favor.³ We are therefore to understand that the presumption of continuance, as

¹ See Whart. on Ev. § 815, for cases.

² See *supra*, §§ 320–6.

³ See Heffter, App. to Weber, 280; *Scales v. Key*, 11 A. & E. 819; *Mercer v. Cheese*, 4 M. & Gr. 804; *Price v. Price*, 16 M. & W. 232. It is in this sense that we are to understand the term “presumption,” as used in the following as well as in other opinions:—

“A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty months

since, justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence. *Walrod v. Ball*, 9 Barb. 271; *Cooper v. Dedrick*, 22 Ibid. 516; *Smith v. Smith*, 4 Paige, 432; *McMahon v. Harrison*, 2 Seld. 443; *Sleeper v. Van Middlesworth*, 4 Denio, 431; *Nixon v. Palmer*, 10 Barb. 175. This analogy is fairly applicable to the present case, and justifies the admission of this evidence.” *Hunt, C., Wilkins v. Earle*, 44 N. Y. 172. See also *R. v. Lilleshall*, 7 Q. B. 158.

it is called, is simply a mode of determining on which party lies the burden of proof. In this sense we are justified in holding that the continuance of an existing condition is a presumption of fact, dependent for its intensity on the circumstances of the particular case. The burden is on the party seeking to show change, and if he fails to show it, he loses his suit.¹ But the question is one dependent on the relation of conditions to time. A state of war, for instance, existing yesterday, will in this sense be presumed to continue to-day; but it will not be presumed to continue after the lapse of ten years. I look at a block of houses in a large city, and I am justified in presuming that the same tenants that are in them to-day will be in them to-morrow. But it is otherwise when I look forward as far as twenty years. When the twenty years are past, it is not probable that a single one of these tenants will remain. Anger, directed to a particular person, once roused, will be presumed to continue during hot blood, but not during the snows of many years. In fact, so far from continuance being a legal presumption, the presumption, in things dependent upon human conditions, in the long run, is the other way. Man never continueth in one stay. Of what will happen ten years hence, the only presumption that can be offered with anything like certainty is, that there will be a change, at least in the actors in the drama, from what is happening to-day. The time required for the change depends upon the nature of the object. Fifty years ago the houses in one of our western cities did not exist. Ten minutes ago, the man whom I now see standing in front of one of those houses was in his counting-room, or in the cars. The presumption of wealth, which may be sought as the explanation of a murderous assault, may have obtained five years ago as to a man in good business, but cannot continue after a succession of commercial disasters. We cannot, therefore, speak of a legal presumption of continuance, when, if we are to draw any inference that would be permanently applicable, it would be that of change. And yet, for short calculations, so far as is consistent with the inductions of social science, we are justified in saying, as a means for adjusting the burden of proof, that the presumption is so far in favor of continuance, that the burden is on a party who seeks to

¹ See Whart. on Ev. § 1284.

show a change from a condition which, when we last heard from it, was settled, and which, from the nature of things, would probably exist to-day unchanged. But the presumption, as it is called, even as to short calculations, is a mere inference that that which has been will be, all other things remaining the same.¹

§ 817. It has been also ruled as a presumption of fact, for the purpose, in like manner, of determining the burden of proof, that a party resides in the last place known to have been accepted by him as his residence, unless he has shown that he retains such residence no longer.² The same inference is applicable to the settlement of a pauper, and to domicil.³ Yet, as we have seen, presumptions of this class are purely artificial. It is necessary to place a person who has wandered away somewhere; and we therefore place him in the spot where he was last heard from, though the very evidence that shows he was in it shows he has left it.

§ 818. Occupation and possession, for the like purpose, are inferred to be continuous; the inference varying with the person occupying, the thing occupied, and the place and period of occupation.⁴ For the same purpose, also, ownership is presumed to continue until alienation.⁵ It is sufficient, therefore, in cases of larceny, to prove that the goods stolen belonged, a short time before the stealing, to the alleged owner. The burden to prove alienation will be on the defence.⁶

§ 819. Habits of individuals may come up for comparison in issues of identity, it becoming a material question whether a claim-

¹ "In a second class of cases, time will enter as a principal ground of similarity. When we hear a clock pendulum beat moment after moment, at equal intervals, and with a uniform sound, we confidently expect that the stroke will continue to be repeated uniformly. A comet having appeared several times at nearly equal intervals, we infer that it will probably appear again at the end of another like interval. A man who has returned home evening after evening for many years, and found his house standing, may, on like grounds, expect that it will be standing the next evening, and on

many succeeding evenings. Even the continuous existence of an object in an unaltered state, or the finding again of that which we have hidden, is but a matter of inference to be decided by experience." Jevons' Principles of Science, i. 252.

² Ripley v. Hebron, 60 Me. 379.

³ Whart. on Ev. § 1285.

⁴ Smith v. Stapleton, Plowd. 193; Winkley v. Kaime, 32 N. H. 268; Currier v. Gale, 9 Allen, 522; Rhone v. Gale, 12 Minn. 54.

⁵ Whart. Crim. Law, 8th ed. § 862; Magee v. Scott, 9 Cush. 148.

⁶ Ibid.

ant has the characteristic traits of the person with whom he pretends to be identical. In such cases "habits are a means of identification, though with strength in proportion to their peculiarity."¹ Such admissibility rests on the fact that habits become a second nature, and that special aptitudes cannot readily be unlearned, special characteristics cannot readily be extinguished, special tricks of manner cannot readily be overcome.² But questions of identity³ are an exception to the general rule, which is, that evidence of habit is inadmissible for the purpose of showing that a particular person did or did not do a particular thing. On the other hand, when a series of writings of a particular person are in evidence, a litigated writing imputed to him may be tested by comparison with the writings proved to emanate from him.⁴ It has also, as we have seen,⁵ been held admissible to prove habit or system in order to rebut the defence of accident, or to infer *scienter*. We have a right, again, to infer, as a presumption of fact, that mental conditions continue unchanged, unless there be reasons to infer the contrary. It is on this ground that we infer the continuance of sanity and of chronic insanity;⁶ and of purposes once deliberately formed.⁷ The habit, also, of a writer, in using words in a particular sense, may be shown in certain cases of latent ambiguity.⁸

§ 820. As between parties still living, coverture, once proved, is inferred to continue;⁹ and hence, when once established, its burdens and obligations will be regarded as existing until its dissolution be shown.¹⁰

§ 821. Solvency¹¹ and insolvency, when established, are inferred to continue until the contrary is proved, or until from the lapse of time a change of condition is prob-

Habit presumed to be continuous.

Continuance of coverture.

Solvency and insolvency.

¹ Agnew, C. J., *Udderzook v. Com.* 76 Penn. St. 340.

² For a series of acute observations on this principle see the charge of Cockburn, C. J., in *R. v. Orton*.

³ In *Udderzook v. Com.* 76 Penn. St. 340, habits of intoxication were admitted among the means of identification.

⁴ *Supra*, § 556.

⁵ *Supra*, § 32.

⁶ See *supra*, § 730.

⁷ *Supra*, §§ 734 *et seq.*, 784.

⁸ Whart. on Ev. § 962.

⁹ *Erschine v. Davis*, 25 Ill. 251.

¹⁰ *Supra*, § 810.

¹¹ *Wallace v. Hull*, 28 Ga. 68.

able.¹ An adjudication of bankruptcy may, within a limited range of time, afford an inference of insolvency.²

§ 822. States whose political origin is homogeneous are presumed to possess laws substantially the same. This presumption, however, does not extend to States whose jurisprudence springs from a different system, nor can we impute to a foreign jurisprudence idiosyncrasies we know to be peculiar to ourselves. But in any view, if we wish to prove a foreign law as distinguished from our own, we must prove such law as a fact.³

Foreign laws presumed to be similar to our own.

§ 823. What are called popularly the laws of nature may be inferred to be constant until the contrary be proved.⁴ The seasons, for instance, pursue, in the long run, a regular course, so that we may be entitled as a general rule to say that winter is cold and summer is warm ; though this is open to proof that in an exceptional season the winter is comparatively mild or the summer is comparatively cool. Of this uniformity parties are supposed to have notice. It may be that a particular winter night may be so mild that a child might be exposed to it safely without shelter ; but this will be no defence to a person negligently exposing a child on a winter night in such a way that it is seriously injured. It may be that a freshet may so swell a river that its shallows may be safely passed at low tide ; but this will be no defence to a pilot, who without sounding runs his vessel aground on low tide, thereby negligently destroying life. It may be that an engine may, when left to itself, enter on the proper track ; but this will be no defence to a switch-tender who neglects his post so that an engine is wrecked. It may be that the defendant was prevented from performing a duty incumbent on him by a storm ; but if so, this must be shown. Hence it is that *casus*, or the extraordinary interruption of natural laws, must be proved by the party averring such interruption.⁵ In order, also, to permit inferences from certain natural conditions, these conditions must

Constancy of nature presumed.

¹ Whart. on Ev. § 821. The presumption of insolvency from a return of *nulla bona* is elsewhere noticed. Supra, § 612.

² Safford v. Grout, 120 Mass. 20.

³ Whart. on Ev. §§ 814 *et seq.*

And see McKenzie v. Wardwell, 61 Me. 136 ; Com. v. Kenney, 120 Mass. 387.

⁴ Supra, § 37.

⁵ See supra ; Whart. on Ev. § 363.

first be established.¹ But where the conditions are the same, evidence of systematic constant phenomena (*e. g.* snow in one place to prove snow in another place in the immediate vicinity) is relevant.²

§ 824. We are, therefore, to regard the ordinary sequences of nature as among the contingencies to be expected by reasonable men. Among these we may specify the falling of water from a higher to a lower level;³ the spreading of fire in inflammable material;⁴ the continuous movement of a railway train over the track, and the fact that the shock on meeting an obstacle is in proportion to momentum;⁵ and the effect of water in extinguishing fire.⁶

§ 825. It is also a presumption of fact, that animals will act in conformity with their nature.⁷ Thus it is probable that cattle will stray;⁸ that horses will take fright at extraordinary noises and sights;⁹ and that dogs, proved to be ferocious, will do mischief when let loose in places where travellers pass.¹⁰ The habits and temper of animals, however,

¹ *Hawks v. Inhabitants*, 110 Mass. 110. As to inferences from system see §§ 32 *et seq.*; Mill's Logic, ch. xiv.

² *Brooks v. Acton*, 117 Mass. 204. See *supra*, § 37.

³ *Collins v. Middle Level Com.* L. R. 4 C. P. 279.

⁴ L. 30. § 3; D. ad leg. Aquil.; *Tuberville v. Stamp*, 1 Salk. 13; *Filiter v. Phippard*, 11 Q. B. 347; *Smith v. R. R.* L. R. 5 C. P. 98; *Perley v. R. R.* 98 Mass. 414; *Higgins v. Dewey*, 107 Mass. 494; *Calkins v. Barger*, 44 Barb. 424; *Collins v. Groseclose*, 40 Ind. 414; *Gagg v. Vetter*, 41 Ind. 228; *Hanlon v. Ingram*, 3 Iowa, 81; *Averitt v. Murrell*, 4 Jones (N. C.), 223; *Cleland v. Thornton*, 43 Cal. 437.

⁵ See *R. v. Pargeter*, 3 Cox C. C. 191; *Caswell v. R. R.* 98 Mass. 194; *Wilds v. R. R.* 29 N. Y. 315; *Jones v. R. R.* 67 N. C. 125.

⁶ *Metallic Comp. Co. v. R. R.* 109 Mass. 277.

⁷ See *Carlton v. Hescox*, 107 Mass. 410; *Rowe v. Bird*, 48 Vt. 578.

⁸ *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

⁹ *R. v. Jones*, 3 Camp. 230; *Hill v. New River Co.* 15 L. T. N. S. 555; *Lake v. Milliken*, 62 Me. 240; *Jones v. R. R.* 107 Mass. 261; *Judd v. Fargo*, 107 Mass. 265; *People v. Cunningham*, 1 Denio, 524; *Congreve v. Morgan*, 18 N. Y. 84; *Loubz v. Hafner*, 1 Dev. 185; *Moreland v. Mitchell County*, 40 Iowa, 394.

¹⁰ When the character of an animal comes into question, the general inference is that he will follow the natural bent of the species to which he belongs. See question discussed fully in Whart. on Neg. §§ 923-5. But when the burden is on a party to prove a *scienter* in the owner of a mischievous animal, it is admissible to put in evidence particular facts; *Worth v. Gilling*, L. R. 2 C. P. 1; *Judge v. Cox*, 1 Stark. 285; *Kittredge v. Elliott*, 16 N. H. 77;

cannot be shown by proof of habits or temper of particular animals of the same species.¹

§ 826. Taking men in bodies, and contemplating their action as a mass, there are certain incidents which may be regarded as probable, and which, under certain conditions, are presumable.² Thus it is to be inferred that persons will be passing a thoroughfare in such numbers as to make it dangerous to discharge at random a gun towards such thoroughfare;³ that a sudden alarm, resulting in injury, will be produced by a shock of any kind given to a crowd;⁴ and that persons in fright will act instinctively and convulsively.⁵ It is on this principle that persons inciting a riot are indictable for hurts which are the ordinary incidents of riots, and which follow in the particular riot such persons incite.⁶

So of conduct of men in masses.

X. PRESUMPTIONS OF REGULARITY.

§ 827. As we have elsewhere seen, when a man and woman have lived together as man and wife, and have been recognized as such in the community in which they live, their marriage will be held *prima facie* conformable, so far as concerns its solemnities, with the practice of the *lex loci contractus*.⁷ The inference from their cohabitation,

Marriage presumed to have been regular.

Whittier v. Franklin, 46 N. H. 23; Arnold v. Norton, 25 Conn. 92; Buckley v. Leonard, 4 Denio, 500; Cockerham v. Nixon, 11 Ired. 269; McCaskill v. Elliott, 5 Strobb. 196; as well as general reputation; Whart. on Neg. § 924; but as to general reputation, see *contra*, Heath v. West, 26 N. H. 191.

¹ Collins v. Dorchester, 6 Cush. 396; Hawks v. Charlemont, 110 Mass. 110. See, however, Darling v. Westmoreland, 52 N. H. 401.

² See Whart. on Neg. § 108.

³ See Burton's case, 1 Str. 481; People v. Fuller, 2 Parker C. R. 16; Triscoll v. Newark Co. 37 N. Y. 637; Sparks v. Com. 3 Bush, 111; State v. Vance, 17 Iowa, 138; Bizzell v. Booker, 16 Ark. 308.

⁴ Scott v. Shepherd, 2 W. B. 892;

Guille v. Swan, 19 Johns. 381; Fairbanks v. Kerr, 70 Penn. St. 86.

⁵ R. v. Pitts, C. & M. 284; Adams v. R. R. 4 L. R. C. P. 739; Sears v. Dennis, 105 Mass. 310; Coulter v. Exp. Co. 5 Lansing, 67; Buel v. R. R. 81 N. Y. 314; Frink v. Potter, 17 Ill. 406; Greenleaf v. R. R. 29 Iowa, 47.

⁶ Whart. Crim. Law, 8th ed. §§ 220, 1533.

⁷ Supra, § 170; infra, § 835; Harrod v. Harrod, 1 K. & J. 15; R. v. Brampton, 10 East, 302; Redgrave v. Redgrave, 38 Md. 93.

In an English prosecution for bigamy, in 1876 (R. v. Creswell, 13 Cox C. C. 126; L. R. 1 Q. B. D. 446), it was alleged that the first marriage was invalid, having been contracted under these circumstances: While the parish church was under repair, divine

and from the admissions it involves, is that they were duly married prior to the period in which cohabitation began. This inference may be met and overcome by counter inferences. It may be shown that the cohabitation was clandestine, and the recognition only occasional, and explicable by other hypotheses than that of marriage.¹ It may also, when the evidence is faint, be overcome by the presumption of innocence, by force of which it is necessary, in order to convict, that the ingredients of the offence should be proved beyond reasonable doubt.²

service had been several times performed by a clerk in holy orders in a chamber at a private hall, and the marriage of the prisoner with his wife was solemnized there. There was no evidence that the chamber at the hall was licensed for the performance of divine service or marriage. It was held, that the presumption was that the place was duly licensed, and that the marriage was valid. Lush, J., said: "The fact of the marriage service having been performed by a person acting in a public capacity is *primâ facie* evidence as to the person's legal capacity to perform the service. So the fact of its having been performed in a place by a person acting in such capacity is also *primâ facie* evidence that the place was properly licensed for marriages. The presumption covers both the person and the place." To this effect see Lord Lyndhurst in *Morris v. Davies*, 5 Cl. & Fin. 163; and Lord Cottenham in *Piers v. Piers*, 2 H. L. C. 362. Compare *Harrison v. Southampton*, 22 L. J. Ch. 722; *Breadalbane case*, L. R. 1 H. L. Sc. 182; *Cunningham v. Cunningham*, 2 Dow, 507; *Campbell v. Campbell*, L. R. 1 Sc. App. 193; *Sichel v. Lambert*, 15 C. B. (N. S.) 781.

In *De Thoren v. Attorney General*, L. R. 1 App. Cas. H. L. (Div.) 686, it was ruled by the lord chancellor (Lord Cairns), that the presumption

of marriage is much stronger than the presumption in regard to other facts. Hence when a matrimonial ceremony took place in Scotland, the parties being ignorant of an impediment, and afterwards removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent by verbal declaration. The inference to be drawn was that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract. The *onus* of rebutting a marriage by habit and repute, it was said, is thrown on those who deny it. See remarks *supra*, §§ 170-6, 686.

¹ See *Clayton v. Wardell*, 5 Barb. 214; S. C., 4 Comst. 230; *Senser v. Bower*, 1 Penn. Rep. 450; *Jones v. Jones*, 45 Md. 159; S. C., 48 Md. 391.

² *Supra*, § 171. *Best's Ev.* § 349. In *Kopke v. People*, S. C. Mich. 1880, *supra*, § 533, it was held that in bigamy, where the proof was that the alleged first marriage was irregularly solemnized in another State, and there was no cohabitation, there must be independent proof of consent of the parties to such marriage.

Presump-
tion of con-
tinuance of
concubin-
age.

§ 827 *a*. When prior concubinage is proved, the inference is that it continues; and consequently in such case marriage must be substantively proved, if set up.¹

Legiti-
macy a
presump-
tion of law.

§ 828. Legitimacy is assigned, by a rebuttable presumption, to all persons living in civilized countries.² A child born in wedlock, before any judicial separation of his parents, is presumed to be their legitimate child, no matter how soon the birth be after the marriage;³ though this presumption may be overcome by proof that the husband was incapable, on ground either of impotence or absence, of being father of the child.⁴ When access is proved, it requires the strongest evidence of non-intercourse to justify a judgment of illegitimacy.⁵ Separation, however, by a court of competent jurisdiction, even though there be no divorce, destroys the presumption, and the children born to the woman after the separation are *prima facie* illegitimate.⁶ But adultery on the wife's part, no matter how clearly proved, will not have this effect, if the husband had access to the wife at the beginning of the period of gestation, unless there should be positive proof of non-intercourse.⁷

§ 829. When a judicial record, properly authenticated, is put in evidence, the burden is on the party who assails it on account

¹ See cases cited in Whart. on Ev. § 1297; Williams v. Williams, 46 Wis. 464.

² 5 Co. 98 *b*; Morris v. Davies, 5 Cl. & F. 163; Banbury Peerage case, 1 Sim. & St. 153.

³ Best's Ev. § 349; Fleming v. Fleming, 4 Bing. 266; Reed v. Passer, 1 Peake, 233; Sichel v. Lambert, 15 C. B. (N. S.) 781, 787; Stegall v. Stegall, 2 Brock. 256; Danelli v. Danelli, 4 Bush, 60.

⁴ Morris v. Davies, 5 Cl. & F. 163; R. v. Mansfield, 1 Q. B. 444; Atchley v. Sprigg, 33 L. J. Ch. 345; Strode v. Magowan, 2 Bush, 621; Ward v. Dulaney, 23 Miss. 410; Herring v. Goodson, 43 Miss. 392.

⁵ See cases cited in Whart. on Ev. § 828. That parents are incompetent to prove non-access see *supra*, § 518.

Sir J. F. Stephen (Evid. art. 98)

states the law to be, that "declarations by either parent as to sexual intercourse are not regarded as relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, provided that in applications for affiliation orders, when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten."

⁶ Sidney v. Sidney, 3 P. Wms. 275; St. George's v. St. Margaret's, 1 Salk. 123.

⁷ Bury v. Phillpot, 2 My. & K. 349; Head v. Head, 1 Sim. & S. 150; Com. v. Shepherd, 6 Binn. 283; Com. v. Stricker, 1 Br. App. xlvii.; Com. v. Wentz, 1 Ashm. 269; State v. Petaway, 3 Hawks, 623.

of latent imperfections or fraud.¹ It is sometimes said that the law presumes all such records to be correct. But the true view is that while the burden is on those who would assail a record on its face regular, yet when the issue is made, *e. g.* when it is alleged that a record was fraudulently concocted, the question (unless it be on an indictment against the parties charged with the fraud) is to be decided by a preponderance of proof. Where the fraud is the gravamen of the case, then, to convict, it must be proved beyond reasonable doubt.²

Burden on party assailing judicial records.

§ 830. It is otherwise when we come to the construction to be given by a court when called to decide as to the legal sufficiency of the records of other tribunals. In such cases, between two permissible constructions, that most favorable to the validity of the record will be accepted.

In error, necessary facts will be presumed.

Thus after a verdict, a court in review will assume that all facts necessary for the support of the verdict were proved, unless the contrary appear in the record duly before the court.³ Whatever facts are necessary to the support of a record statement will be presumed to have been duly proved.⁴ It will also be presumed by a court of error, when there is a general verdict in the court below on a series of counts, and a sentence on one of them, that this sentence was on the count to which the evidence applied.⁵ But presumptions of this class do not extend to the supply of statements necessary to make a record complete, or which should be the subject of independent articulate averments.⁶ Thus the omission of an averment of arraignment cannot be supplied by an appellate court.⁷ Jurisdiction, also, cannot be inferred, as to courts of limited jurisdiction, but must appear on the record.⁸ But justices of the peace, and other judicial officers, though of special and limited powers, will be presumed to have acted regu-

¹ Thus it will be assumed that when a jury is recorded as sworn, that they were sworn correctly. *Mitchell v. State*, 58 Ala. 417.

² Whart. on Ev. § 1304. *Supra*, §§ 570, 620.

³ *R. v. Waters*, 1 Den. C. C. 356; *R. v. Bowen*, 13 Q. B. 790; *Beale v. Com.* 25 Penn. St. 11; *Powell on App.*

Jur. 158. For civil cases see Whart. on Ev. § 1305.

⁴ Whart. on Ev. § 1304.

⁵ Whart. Cr. Pl. & Pr. §§ 907 *et seq.*; *Davis v. State*, 6 Tex. Ap. 196.

⁶ Whart. on Ev. § 1305.

⁷ Whart. Cr. Pl. & Pr. §§ 699, 777.

⁸ Whart. on Ev. § 1308.

larly, as to a matter within their jurisdiction, unless the record shows the contrary. And a warrant of conviction, purporting to be founded on a preceding conviction, has been sustained in England, though it does not state that the evidence was given on oath, or in the presence of the prisoner.¹

§ 831. The legislature, whether federal or state, when acting within its constitutional range, is presumed to act in conformity with law, whenever the contrary does not plainly and expressly appear. Hence we must *prima facie* hold that the respective houses, as component parts of a legislature, act within their jurisdiction and agreeably to parliamentary usages and the rules of law and justice. It has therefore been held that a warrant issued by the speaker of a legislative house, at the instance of the house, for the arrest of a witness, need not contain any recital of the grounds on which it was founded.²

§ 832. Documents, on their face duly attested, are presumed to have been executed in conformity with the local law of the place of execution, so far as to throw the burden of proving the contrary on the assailing party. When the place of execution, however, is a foreign country, the way in which the execution is to be proved must be determined by the rules of private international law.³

§ 833. For the purpose of determining the question of the burden of proof, it is assumed that a person acting as a public officer is authorized to act as such.⁴ Where a policeman, for instance, is resisted when executing a warrant, the burden of showing the illegality of his appointment (when not on its face illegal) is on the party resisting; though that the presumption is satisfied when it determines the burden is shown by the fact, that when the evidence is all in the question is to be decided on the merits. The same distinction is applicable in cases where an alleged officer is indicted for killing when attempting an arrest. If, when the killing took place he was acting as an officer, the burden is on the prosecution to show that he was not duly commissioned. But this means

¹ Whart. on Ev. § 1308.

² Whart. on Ev. §§ 831, 1309.

³ See Whart. on Ev. § 1313.

⁴ See Whart. Crim. Law, 8th ed. §§ 1570, 1589, 1617, 1671. Supra, § 164.

only that the initiative is on the party contesting his authority ; for it would be absurd to say that the law presumes that all private persons claiming to be officers are to have any vantage ground, when the case comes up on the merits, as against those whose rights they invade. In this sense we are to hold that a person acting as a public or *quasi* public officer is to be so far recognized as such, that his appointment is to be treated as regular until the contrary be proved.¹ As officers, in the sense above stated, have been regarded justices of the peace ;² soldiers engaged in recruiting ;³ constables and policemen ;⁴ attorneys ;⁵ and post officers and their employees.⁶ Even when a party is indicted for misconduct in office, it is sufficient, *prima facie*, to show that he acted in the particular office in which the misconduct is supposed. In such case it is not necessary to produce, on the part of the prosecution, the record of his appointment.⁷

This presumption, however, such as it is, does not apply to special private agents,⁸ though the fact that a general agent is recognized as such by his principal makes it unnecessary for the party relying on such agency to prove a formal authorization as against the principal.⁹ And the presumption does not apply in

¹ R. v. Borrett, 6 C. & P. 124; R. v. Verelst, 3 Camp. 432; Riley v. Packington, L. R. 2 C. P. 53; R. v. Gordon, 2 Leach C. C. 581; R. v. Howard, 1 M. & Rob. 188; McGahey v. Alston, 2 M. & W. 188; R. v. Roberts, 14 Cox C. C. 101; Bank U. S. v. Dandridge, 12 Wheat. 70; Sheets v. Selden, 2 Wall. 177; Mech. Bk. v. Union Bk. 22 Wall. 276; Cabot v. Given, 45 Me. 144; State v. Roberts, 52 N. H. 492; Briggs v. Taylor, 35 Vt. 57; Fay v. Richmond, 43 Vt. 25; Com. v. Fowler, 10 Mass. 290; Com. v. McCue, 16 Gray, 226; Nelson v. People, 23 N. Y. 293; State v. Perkins, 4 Zab. 409; Stevenson v. Hoy, 48 Penn. St. 260; Conolly v. Riley, 25 Md. 402; Strang, ex parte, 21 Oh. St. 610; Druse v. Wheeler, 22 Mich. 439; State v. Mayberry, 3 Strobb. 144; State v. Hill, 2 Speers, 150. Whart. on Agency, §§ 44, 121. See *supra*, § 164.

² Berryman v. Wise, 4 T. R. 366.

³ Walton v. Gavin, 16 Q. B. 48.

⁴ Berryman v. Wise, 4 T. R. 366; Butler v. Ford, C. & M. 662.

⁵ Pearce v. Whale, 5 B. & C. 38. See R. v. Newton, 1 C. & K. 480.

⁶ R. v. Rees, 6 C. & P. 606.

⁷ Clay's case, 2 East P. C. 580; R. v. Rees, 6 C. & P. 606; R. v. Goodwin, 1 Lew. C. C. 100; Com. v. Fowler, 10 Mass. 290; People v. Cock, 4 Seld. 67; State v. Perkins, 4 Zab. 409; Com. v. Rupp, 9 Watts, 114; State v. Hill, 2 Speers, 150.

⁸ Short v. Lee, 2 Jac. & W. 468; Best's Ev. § 357.

⁹ See Whart. on Ev. § 1316; Merchants' Bank v. State Bank, 10 Wall. 604; Faneuil Hall Bank v. Bank of Brighton, 16 Gray, 534; Reed v. R. R. 120 Mass. 43; Hughes v. R. R. 36 N. Y. Sup. Ct. 222.

cases in which the evidence shows that the alleged appointment under which the supposed officer acted was a nullity.¹

§ 834. When a person claiming to be a professional man is indicted for negligence as such, it is not necessary for the prosecution to prove that he had a legal right to the professional status he assumed. Nor is it necessary, when an expert is examined as a professional man, to put in evidence his diploma. In all such cases the party himself is estopped from denying that he is that which he claims to be; and if the object be to dispute his authority, the burden is on the party assailing this authority.²

§ 835. On the same reasoning the acts of administrative or judicial officers are presumed to be regular, so far as to throw the burden of proof on the party collaterally assailing such acts on the ground of irregularity.³ Where it is alleged, for instance, that a warrant under which a police officer makes an arrest is defective (the defect not being patent on the procedure), the burden is on the party setting up the defect. Nor in such cases is it necessary for the warrant or other authorizing record to assert specifically all antecedent steps of procedure, not in themselves essential to jurisdiction, the averment of the taking of which may be assumed to be contained in the averments actually expressed. In such case the burden is on the opposite side to show that these steps were not actually taken.⁴ The presumption just given is not limited to officers of state. Thus in a prosecution for bigamy, where the marriage was proved by the witness present to have taken place at the parish church, and to have been solemnized by the

¹ *Lambert v. People*, 76 N. Y. 220. In *Lambert v. People*, supra, it was held that to sustain the allegation of the official status of a notary, in an indictment for perjury, it is necessary to show that the officer was *de facto* or *de jure*; and evidence is admissible in such case to prove the incompetency of the alleged notary to hold the office.

² See cases in Whart. on Ev. § 1317.

³ *R. v. Hinckley*, 12 East, 361; *R.*

v. Catesby, 2 B. & C. 814; *Gosset v. Howard*, 10 Q. B. 411; *R. v. Stainforth*, 11 Q. B. 66; *R. v. Broadhempston*, 1 E. & E. 154; *U. S. v. Weed*, 5 Wall. 62; *Rolland v. Com.* 82 Penn. St. 306; and other cases cited Whart. on Ev. § 835; *People v. Stevens*, 5 Hill (N. Y.), 616; *People v. Cock*, 8 N. Y. 67.

⁴ *R. v. Stainforth*, 11 Q. B. 66; and other cases cited Whart. on Ev. § 835.

curate of the parish, it was held unnecessary to prove either the registration of the marriage, or the fact of any license having been granted.¹

This presumption, however, is not to be extended so as to make it cover substantive independent facts as distinguished from facts which are the mere incidents of others duly established.²

It must be further kept in mind, as to presumptions of this class, that to throw the burden on the objector, the conduct of the officer must be on its face regular.³

§ 836. Where a public officer is prosecuted for misconduct, then, when the case goes to the jury, there is no presumption, as we have seen, of special official virtue in his favor, the only privilege that he has to claim in this respect being the privilege of all persons charged with crime, that his guilt should be proved beyond reasonable doubt.⁴ All that is meant by the presumption, as it is called, immediately before us, is that a public officer is so far assumed *prima facie* to do his duty, that the burden is on the party seeking to charge him with misconduct. And this is in full harmony with the general rule above given, that on the actor lies the burden. The same reasoning applies in cases where the conduct of the officer comes collaterally in question. The burden is on those

Burden of proof is on party charging public officer with misconduct.

¹ R. v. Allison, R. & R. 109. See supra, § 827 for other cases.

² "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his treatise on Evidence, § 300, says: 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those

acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact." Strong, J., U. S. v. Ross, 92 U. S. 283, 284, 285.

³ Whart. on Ev. § 1304; Welsh v. Cochran, 63 N. Y. 181; Lambert v. People, 76 N. Y. 220. Supra, § 833.

⁴ R. v. Tracy, 6 Mod. 30; R. v. James, 1 T. & M. 300; 2 Den. C. C. 1; U. S. v. Ross, 92 U. S. 283; People v. Coon, 15 Wend. 277; State v. McEntyre, 3 Ired. 171. See Whart. Crim. Law, 8th ed. § 1583. Supra, § 835.

assailing such conduct; and so far, the conduct of such officer is *prima facie* presumed to be right.¹

§ 836 a. When an official or corporate act has been executed, and when in consequence of it a condition of things has continued for a considerable period, which condition of things would probably not have been acquiesced in had it not been duly authorized, such authority will be presumed. Thus the fact that a corporation has maintained a bridge and draw over a stream for fifteen years is sufficient evidence, on an indictment against a person for interference with the bridge, to show that the bridge was legally erected and maintained.² That it is not necessary to prove the charter of a domestic corporation has been already noticed.³

§ 837. The mailing a letter, properly addressed and stamped, to a person known to be doing business in a place where there is established a regular delivery of letters, is *prima facie* proof of the reception of the letter by the person to whom it is addressed.⁴ Such proof, however, is open to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case.⁵ In cases of registered letters the presumption is peculiarly strong; ⁶ in cases of ordinary letters, where there is no mail delivery, there is no presumption at all,⁷ and delivery must be substantially proved.⁸ The rule as

¹ Whart. on Ev. § 1319.

² Com. v. Chase, 127 Mass. 7; citing Com. v. Bakeman, 105 Mass. 53.

³ Supra, § 164 a.

⁴ See cases cited in Whart. on Ev. § 1323.

⁵ Ibid.; Reidpath's case, 40 L. J. Ch. 39; U. S. v. Babcock, 3 Dillon C. C. 571; Freeman v. Morey, 45 Me. 50; Greenfield Bank v. Crafts, 4 Allen, 447; First Nat. Bank v. McManigle, 69 Penn. St. 156; Foster v. Leeper, 29 Ga. 294. See Tate v. Sullivan, 30 Md. 464; Lyon v. Guild, 5 Heisk. 175.

⁶ Best's Ev. § 403.

⁷ Bilb Gerry v. Branch, 19 Grat. 393; James v. Wade, 21 La. An. 548.

⁸ First Nat. Bank of Bellefonte v. McManigle, 69 Penn. St. 159.

“ Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid, and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow, in Comm. v. Jeffries, 7 Allen, 563, that this ‘ is evidence tending to show that such letters reached their destination, and were received by the persons to whom they were addressed.’ This is not a conclusive presumption; and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters. ‘ A fact,’ says Ag-

to letters, however, applies only to letters mailed at points other than that at which the party written to resides. Notices of local transactions, to persons living in the same place as that from which the notice is issued, should, it seems, be served personally.¹ To enable the presumption to operate, it is essential that the letter should be addressed with specific correctness. Thus it has been held that no presumption of delivery attached to a letter addressed, "Mr. Haynes, Bristol."² The same inference from regularity, under the same limitations, may be drawn as to the delivery of telegraphic dispatches;³ though ordinarily the original message should be produced.⁴

§ 838. A letter duly stamped and mailed is inferred, by a presumption of fact, to be delivered at the usual period for such delivery.⁵

Letter presumed to arrive at usual time of delivery.

§ 839. The post-mark on a letter, if decipherable, raises a presumption that the letter was in the post at the time and place specified in such post-mark, but this again is a rebuttable presumption.⁶

Post-mark *prima facie* proof.

§ 840. To other modes of settled and regular business delivery the same presumption applies.⁷ Hence, where it was proved to be the usage of a hotel for letters addressed to guests to be deposited in an urn at the bar, and then to be sent, about every fifteen minutes, to the rooms of

Letters delivered presumed to have been received.

new, J., *Tanner v. Hughes*, 33 Penn. St. 290, 'in connection with other circumstances, to be referred to the jury,' under appropriate instructions, as its value will depend upon all the circumstances of the particular case." *Dillon, C. J., U. S. v. Babcock*, 3 Dillon, 573.

¹ *Shelburne Bank v. Townsley*, 102 Mass. 177; *Ransom v. Mack*, 2 Hill, 587; *Sheldon v. Benham*, 4 Hill, 129.

² *Walter v. Haynes*, Ry. & M. 149. And see, as narrowing the rule, *Allen v. Blunt*, 2 Wood. & M. 121. See *Phillips v. Scott*, 43 Mo. 86.

³ *Com. v. Jeffries*, 7 Allen, 548; *U. S. v. Babcock*, 3 Dillon, 571.

⁴ *Howley v. Whipple*, 48 N. H. 487. See *supra*, § 162.

⁵ See cases in Whart. on Ev. § 1324.

⁶ *Powell's Evidence*, 4th ed. 88; *R. v. Johnson*, 7 East, 65; *Fletcher v. Braddyl*, 3 Stark. 64; *Archangelo v. Thompson*, 2 Camp. 623; *Shipley v. Todhunter*, 7 C. & P. 680; *Stocken v. Collen*, 7 M. & W. 515; *Butler v. Mountgarrett*, 7 H. L. C. 633; *S. C.*, 6 Ir. Law R. (N. S.) 77; *New Haven Bk. v. Mitchell*, 15 Conn. 206; *Callan v. Gaylord*, 3 Watts, 321.

It is doubted whether the post-mark is evidence of date of forwarding in *Shelburne Bk. v. Townsley*, 102 Mass. 177.

⁷ See *supra*, § 837; *New Haven Bk. v. Mitchell*, 15 Conn. 206. See *Crandall v. Clark*, 7 Barb. 169.

the guests to whom such letters were addressed, it was held to be a presumption of fact that a letter addressed to one of the guests, and left at the bar, was received by such guest.¹ In case of a denial, by the party addressed, of reception, then the case goes to the jury as a question of fact. Delivery to a servant, within the range of his duties, is also, it may be added, *prima facie* proof of delivery to the servant's master.²

Letter in answer to one mailed to the writer presumed to be genuine. § 841. If I should mail a letter to B., addressing him at his residence, and I should receive by mail an answer purporting to come from B., the fact that such an answer is so received makes a *prima facie* case in favor of the genuineness of the answer. The subalterns of the post-office are government officials, whose action is presumed to be regular; and if I can prove that B. lived at the place where he was addressed, then the burden is on him to show that he did not receive the letter, and that the reply mailed in response was not genuine.³

But not telegrams. § 842. It is otherwise, so has it been argued, as to telegraphic dispatches, which are forwarded not in original but in copy, and by private, not public agents.⁴

Presumption from habits of forwarding letters. § 843. Testimony by a clerk that it was his invariable custom to carry certain classes of letters to the post-office, of which class the letter in question is shown to have been one, though he had no recollection as to such letter specifically, has been held sufficient to let a copy of the letter in evidence, after notice to the other side to produce.⁵

XI. DISTINCTIVE INFERENCES IN FORGERY.

§ 844. Genuineness of handwriting is eminently a matter of inference, the constituents of which have been already examined. Among the tests to be applied we may recur to the following:—

Opinion of writer. § 845. (1.) Opinion of the alleged writer himself as to the genuineness of the writing.⁶

¹ Dana v. Kemble, 19 Pick. 112.

² Whart. on Ev. § 1326.

³ For cases see Whart. on Ev. § 1328.

⁴ Howley v. Whipple, 48 N. H. 488.

⁵ See cases in Whart. on Ev. § 843.

⁶ See supra, §§ 549, 550.

§ 846. (2.) Opinion of those who have seen him write or who are familiar with his hand.¹

Of those who know his hand.

§ 847. (3.) Opinion of experts, based on the writing by itself, or on it as compared with other writings.²

Of experts.

§ 848. Chemical and microscopic tests should be resorted to where it is desired to restore the legibility of faded writings,³ and where it is suspected that writing has been destroyed by chlorine or other substances which it is desirable to detect. Microscopic tests, also, are admissible to prove marks of tracing.⁴

Chemical and microscopic tests.

§ 849. In determining the genuineness of writings alleged to be forged it is important to inquire if there is any discrepancy between the date of a writing and the *anno Domini* water-mark in the fabric of the paper;⁵ though that this cannot always be relied upon is illustrated by an in-

Inferences from circumjacent tests.

¹ Supra, § 551.

² Supra, § 559.

On this topic the evidence of Mr. Gould in the Webster case was: "In all the practice that I have ever had in writing, I have never been able to satisfy myself that I could make two letters precisely alike; so perfectly similar as to correspond throughout, if placed one upon the other. And yet, I never saw two handwritings that I could not distinguish. There is some peculiarity in every one's writing which enables a person to identify it; and it is next to impossible to get rid of that peculiarity when the attempt is made to disguise it. Every man who undertakes to disguise his hand must do it either by *carelessness* or *carefulness*: by *carelessly* letting his hand play entirely loose as in mere flourishing; or, by *carefully* guarding every stroke which he makes, in order to prevent its being seen to be his. In this latter mode it is next to impossible for any person to continue his observation for any great length of time, or through any considerable amount of writing,

without making some of those letters which are peculiar to himself, or making them in that peculiar manner which he has been accustomed to do. Frequently these will consist only of a single particle, or character, but which will yet furnish a key for the detection of the real writer." Bemis's Webster case, 202. As to admissibility of such testimony see supra, § 559. As to illustrations of "disguise" see Merivale's Life of Sir P. Francis, London, 1867.

A notice of an interesting trial (Robinson v. Mandell) involving the issues in the text will be found supra, § 9, note. As to identification by misspelling see U. S. v. Chamberlain, 12 Blatch. 390, and cases cited infra, § 851.

³ Devergie, Méd. Lég. ii. p. 887; Duverger, Manual, ii. p. 385.

⁴ Robinson v. Mandell, noticed supra, in note to § 9. And see an article by Mr. R. U. Piper in Am. Law Reg. for May, 1869.

⁵ Crisp v. Walpole, 2 Hagg. 531. See Whart. Crim. Law, 8th ed. § 726.

stance mentioned by Mr. Wills, of a commissioner of the insolvent debtor's court sitting at Wakefield, in 1836, who discovered that the paper he was then using, which had been issued by the government stationer, bore the water-mark of 1837.¹ Extrinsic proof, also, may be adduced to show that the paper used had not, at the date in question, been manufactured.² When post-marks are relied on proving authenticity, these may serve, also, as indications of falsification. The same may be noticed in respect to stamps, which may be shown to have been forged, or to have been fraudulently attached, by proving that such stamps were not in existence at the time of the alleged date. The condition of the paper may serve to identify it with a particular party.³

¹ Wills on Circum. Ev. p. 114.

² See Report in Dickerson's case, N. Y. World, Jan. 18, 1880.

³ In April, 1880, a cadet named Whitaker, a pupil in the Military Institute at West Point, was found in his bed tied and bruised. He stated that the previous night he had been attacked and maltreated by three disguised assailants; and he exhibited an anonymous note of warning which he claimed to have received a few days before. Suspicion having been cast on his story, a court of inquiry was held in May, 1880, under circumstances which invested the case with no little political interest. In order to determine the authorship of the letter of warning, papers emanating from three hundred cadets were submitted to five eminent experts in penmanship, the papers being identified and distinguished only by numbers. These experts, acting separately, concurred, with more or less certainty, in reporting that the note of warning was in the same handwriting as written exercises, of which Whitaker was the unquestionable author. In addition we have the following remarkable incident, as given in the telegraphic reports in the New York papers of May 17, 1880:—

“You will no doubt be surprised,”

expert Southworth stated in his report, “when I tell you that I have a sheet which I have marked ‘A’ in two places, out of set No. 1, from which the paper on which the anonymous note is written was torn. The fact is easily discernible to ordinary vision with the naked eye. This paper out of set No. 1, marked by me ‘A’ twice with blue pencil, has subject matter connected with another sheet which I have marked ‘B’ twice in blue. The sheet ‘B’ is torn from another sheet which I have marked ‘C’ twice. Thus, by a fact mathematically demonstrable, the anonymous note is one of four links, three of which are papers of set 1. I have great satisfaction in discovering this point, which discovery will do much toward settling this whole affair as far as the authority of the anonymous note is concerned.

“I have to the best of my ability arranged two frames of glass so as to exhibit my discovery to any one who may properly examine it.” Mr. Southworth added, “No. 1 is the questioned note placed in juxtaposition with the part of the sheet from set 1, marked ‘A’ in two places. We first notice the cut of the papers on the top as arranged, cut at the paper mill; next the ruling, and then the ragged edges

Forgeries, also, have been detected by the plate from which the printed part of the document was taken, proving to be subsequent in origination to the date of the alleged writing; and in a case heretofore cited exposure was based on the fact that the witness to the forgery (that of a will) volunteered, in his cross-examination, the statement that the testator had placed a sixpence under his wax seal, which sixpence turned out to be subsequent in date to the will.¹

in juxtaposition where it was separated, perhaps with the paper cutter, no matter in what way, so long as an indented spot on one edge has its corresponding tooth opposite.

“The Recorder as he read this exhibited the two panes of glass containing the anonymous note fitted to a sheet on which Whitaker had begun to write the letter to his mother which was found in his room. The Recorder read from expert Gayler’s report of an examination of these papers by microscope. Mr. Gayler believed ‘the two to be parts of the same sheet.’ Expert Ames found that the same blue ruling lines were on each paper, and that the paper in each appeared to be the same when examined under a glass of high power, but Mr. Ames reported that he did not consider himself to be an expert in paper by any means. The Recorder read from Mr. Southworth’s evidence that that expert spent two days in a paper-mill and made many experiments in cutting and tearing paper and then observing the edges when joined before he made his discovery known.”

¹ The following narrative is given by Mr. Warren in his sketch of Lord Sterling’s case (Warren’s Miscellanies, pp. 256, 257, 258): “We have now to record as remarkable an incident as ever occurred in the course of a judicial inquiry. As already stated, one of the two documents *pasted* on the back of the map was the alleged

tombstone inscription. As the map was lying on the table of the densely crowded court, owing to either the heat, or some other cause, one of the corners of the paper on which the inscription was written curled up a little — just far enough to disclose some writing underneath it, on the back of the map. On the attention of the solicitor general being directed to the circumstance, he immediately applied to the court for its permission to detach from the map the paper on which the tombstone inscription was written. Having been duly sworn, he withdrew for that purpose, and soon afterwards returned, having executed his mission very skilfully, without injury to either paper. That on which the inscription was written, proved to be itself a portion of another copy of the map of Canada, and the writing *which it covered* was as follows, but in French: ‘There has just been shown to me a *letter of Fenelon*, written in 1698, having reference to this grandson of Lord Sterling, who was in France during that year, and with regard to whom he expresses himself as follows: “I request that you will see this amiable and good Irishman, Mr. John Alexander, whose acquaintance I made some years ago. He is a man of real merit, and whom every one sees with pleasure *at court*, and in the best circles of the capital.” These were the initials, as far as they are legible, “E. Sh.”’ This was repre-

In the controversy as to the genuineness of the letters implicating Mary Queen of Scots in the murder of Darnley, the issue is mainly dependent on what may be called circumjacent tests.¹

§ 850. “The critical examination of the internal contents of written instruments,” says Mr. Wills, “perhaps of all others, affords the most satisfactory means of disproving their genuineness and authenticity, especially if they profess to be the productions of an anterior age. It is scarcely possible that a forger, however artful in the execution of his design, should be able to frame a spurious composition without betraying its fraudulent origin by some statement or allusion not in harmony with the known character, opinions, and feelings of the pretended writer, or with events or circumstances which must have been known to him, or by a reference to facts or modes of thought characteristic of a later or a different age from that to which the writing relates.”² A deed bearing date the 13th of November, in the second and third years of Philip and Mary, in which they were called “King and Queen of Spain and both Sicilies, and dukes of Burgundy, Milan, and Brabant,” was shown to be fabricated by the fact that at the alleged date

sented by the solicitor general as palpably an inchoate abortive forgery; and Lord Meadowbank pointed out to the jury the evident and partially successful effort which had been made to *tear off* that portion of the surface of the map on which the above had been written. ‘That effort failing,’ said he, ‘the only precaution that remained to prevent its appearing was to cover it over; for which purpose the parties used the inscription. But then the apprehension of its appearing, if the map were held between the light and the eye, seems to have come across the minds of the parties engaged in the operation, and hence, with a very singular degree of foresight, expertness, and precaution, they used for their cover that by which the eye of the inquirer might be misled in his investigation; for you have seen that the lines and words of the map

forming the *back* of the inscription were exactly such as would naturally fall in with those on the *front* of the map of Canada, from which the extract from the pretended letter of Fenelon had refused to be separated. Accordingly the invention, it would appear, had proved hitherto most successful; for though this map had been examined over and over again by persons of the first skill and talent, and scrutinized with the most minute attention, the writing which was thus covered up escaped detection, till, by the extreme heat of the court-house yesterday, or some other cause of a similar nature, a corner of this inscription separated from the map and revealed to our observation that which was hidden below.’ ”

¹ See Froude’s Hist. of England, vol. vii.

² Wills Cir. Ev. p. 111.

Philip and Mary were formally styled "*princes* of Spain and Sicily," and Burgundy was never put before Milan, and they did not assume the title of king and queen of Spain and the Two Sicilies, until Trinity term following.¹ A great point against the so called Forged Decretals consists in the fact that they contain what are supposed to be covert allusions to events subsequent to the period of their alleged publication. Bishop Hefele, in his *Geschichte Concilien*, applies this test with singular sagacity for the purpose of determining which decrees of the later councils are genuine and which are not. It is difficult for a forger to prepare a paper for a use long subsequent to its alleged date, without in some way betraying the purpose. Under our recording system tests of this kind are rarely necessary, since few deeds are operative unless recorded immediately after their execution. It is otherwise, however, as to ancient histories or letters, which are without value unless emanating from the period in which they bear date. At the same time, we must keep in mind that to all truthful narratives errors of detail are incident.²

§ 851. Proof that a certain document is in the handwriting of a particular person may be met by proof that it was written by another person. In the Webster trial, a part of the case of the prosecution was that certain letters, purporting to have been written by third parties, were written by the defendant. Great stress, also, in the Tichborne prosecution, was laid on the fact that letters claimed by the defence to be by the lost heir were really concocted by the claimant, and exhibited his idiosyncrasies of penmanship and spelling. Lord Meadowbank, in his charge to the jury in Humphrey's case, mentioned a remarkable instance of this nature. A tailor in Ayr, of the name of Alexander, having learned that a person of the same name had died, leaving considerable property without any apparent heirs existing, obtained access to a garret in the family mansion, and it was said found there a collection of old letters about the family. These he carried off, and with their aid fabricated a mass of similar productions, which, he claimed, clearly proved his connection with the family of the deceased. When the case came to be tried, it appeared that there were a

¹ *Mossam v. Ivy*, 10 St. Tr. 616.

² *Supra*, §§ 380-1.

number of words in the letters, purporting to be from different individuals, spelt, or rather misspelt, in the same way, and some of them so very peculiar that, on examining them minutely, there was no doubt that they were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table and examined in the presence of the court. He was desired to write a dictation of the Lord Justice Clerk, and he misspelt all the words that were misspelt in the letters precisely the same way; and this and other circumstances proved that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which he had found in the garret; and, according to Mr. Wills, this result was arrived at in the teeth of half a dozen engravers, all saying that they thought the letters were written by different hands.¹

¹ Wills on Cir. Ev. 117, 118.

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